



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

229

46

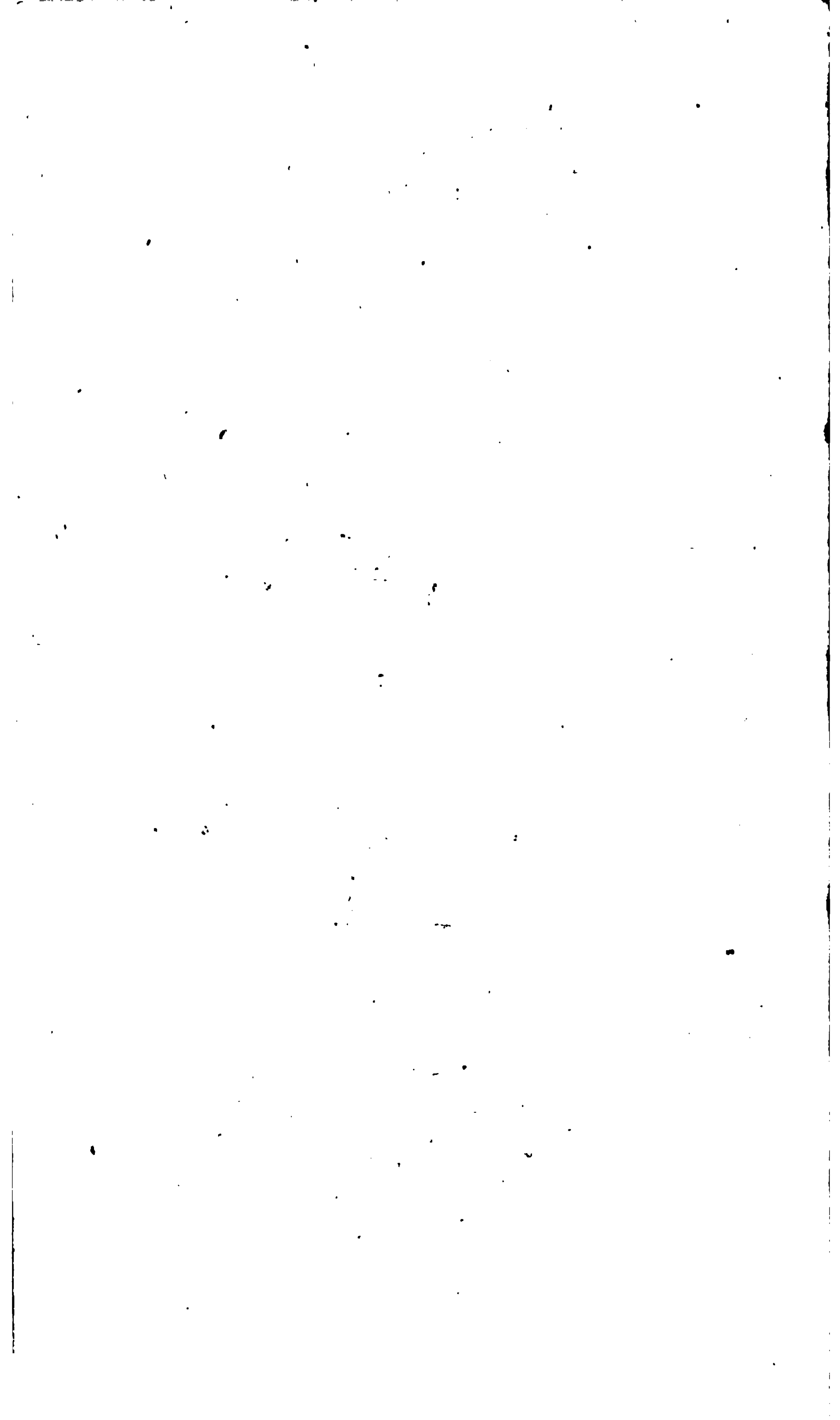
REPORTS
OF
C A S E S
DETERMINED
IN
THE CONSTITUTIONAL COURT
LAW SCHOOL
LIBRARY.
SOUTH-CAROLINA.

BY D. J. McCORD,
A MEMBER OF THE COLUMBIA BAR.

VOL. II.

COLUMBIA, S. C.
PRINTED AND PUBLISHED BY
D. & J. M. FAUST.....STATE PRINTERS,
Pursuant to the Act of Assembly of 1816.

1823.



NAMES OF CASES

REPORTED IN THIS VOLUME.

A.				
Adger & Black <i>ads.</i> Dewes,	105	Caldwell <i>ads.</i> Thompson,	390	
Allen <i>ads.</i> State,	55	Calder <i>ads.</i> State,	462	
Allen <i>ads.</i> Caruth,	226	Cantey <i>vs.</i> Platt,	260	
Allen <i>vs.</i> Potter,	323	Cammer <i>ads.</i> Harrison,	246	
Aubin <i>ads.</i> Lazarus,	134	Caruth <i>vs.</i> Allen,	226	
Applegate <i>ads.</i> State,	110	Carr <i>vs.</i> Green,	75	
Ashley <i>vs.</i> Reeves,	432	Carr <i>et. ux.</i> <i>vs.</i> Jeannerett,	60	
Axson <i>vs.</i> Blakely,	6	Chevis <i>ads.</i> Elms,	349	
		Cheshire <i>vs.</i> Edson,	385	
B.		City Council <i>vs.</i> Van Roven,	465	
Bagley <i>ads.</i> Clements,	244	Do. <i>vs.</i> Rogers,	495	
Baker <i>ads.</i> Mickle,	250	Clarke <i>ads.</i> State,	47	
Ballard <i>ads.</i> Eccles,	388	Clement <i>vs.</i> Bagley,	244	
Bampfield <i>vs.</i> Ellard,	182	Clifford <i>vs.</i> Peinble,	31	
Barre <i>ads.</i> Tavel,	201	Cochran <i>vs.</i> Johnson,	21	
Barmore <i>vs.</i> Jay,	371	Cohen <i>vs.</i> Sadler,	239	
Bauxbaum & Trescott <i>ads.</i> exr.		Cole <i>ads.</i> State,	1	
Wigfall,	135	Cole <i>ads.</i> State,	117	
Belcher <i>ads.</i> Commissioners,	23	Coats <i>vs.</i> Gracy,	224	
Bell <i>vs.</i> Hutchinson,	409	Com'rs <i>vs.</i> Belcher,	23	
Billis <i>ads.</i> State,	12	Com'rs of the Poor <i>ads.</i> Lynah,	170	
Birdseye <i>vs.</i> Davis,	296	Com'rs Roads <i>ads.</i> Harrington,	400	
Black <i>vs.</i> Shooler,	293	Cranston <i>ads.</i> Pelzer,	328	
Blakely <i>ads.</i> Axson,	6	Crocker <i>vs.</i> Hunt,	352	
Bogan <i>ads.</i> P—r,	386	Crayton & Sloan <i>vs.</i> Collins,	457	
Bowman <i>ads.</i> Plunket,	138	Crips <i>ads.</i> Talvande,	164	
Boyce <i>vs.</i> Owens,	208	Crafts <i>vs.</i> Crafts,	54	
Bond <i>ads.</i> Yates,	382	Cumming <i>ads.</i> Williamson,	250	
Bolton <i>ads.</i> Schatzil & Co.	478			
Boman <i>vs.</i> Plunket,	518	D.		
Brandford <i>ads.</i> Givens,	152	Daniel <i>ads.</i> Thomas,	354	
Brooks <i>vs.</i> Floyd,	364	Davie <i>ads.</i> Douglass,	218	
Brooks <i>ads.</i> Lowry,	421	Davis <i>ads.</i> Birdseye,	296	
Broomstock <i>ads.</i> Duncan,	318	Davis <i>ads.</i> Gourdin,	514	
Brummer <i>et. ux.</i> <i>ads.</i> Wilks,	178	Day, Downs & Eastburn <i>vs.</i>		
Brown <i>vs.</i> Thompson,	476	Wilcox,	454	
Butler <i>vs.</i> Denham,	350	Davenport & Co. <i>vs.</i> Riley &		
		O'Hear,	198	
C.		De Arcos <i>vs.</i> S. C. Ins. Com.	113	
Cabiness <i>vs.</i> Mahon,	273	Depeau & Co. <i>vs.</i> Hyama,	146	
Caldwell <i>vs.</i> Harp,	275	Denham <i>ads.</i> Butler,	350	
		De Villers <i>vs.</i> Ford,	144	

TABLE OF CASES.

De Villers vs. Prioleau,	144	Harrington vs. Wilkins,	289
Dewes vs. Auger & Black,	105	Harrington vs. Com. Roads,	400
Doyley, ex Parte,	185	Harman ads. Furnan,	436
Douglass vs. Davie,	218	Do. ads. Do.	442
Duke ads. Parks,	380	Haslet vs. Street,	310
Duncan ads. State,	129	Haynesworth ads. Noyes,	367
Duncan vs. Broomstock,	318	Herbemont vs. Sharp,	264
Duncan ads. Read,	167	Higgins ads. Ogier,	8
Duren ads. Stover,	266	Howell vs. Smith,	516
Dupont ads. State,	334	Hunt ads. Jentry,	410
E.		Hunt ads. Crocker,	352
Eccles vs. Ballard,	388	Hubbell ads. Prescott,	64
Edson ads. Cheshire,	385	Hyams ads. Depeau & Co.	146
Ellards ads. Bampheld,	182	Hutchinson ads. Bell,	409
Elliott ads. Amott,	125	Hynman vs. Washington,	498
Elms vs. Chevis,	349	I & J.	
English vs. English,	258	Jay ads. Barmore,	371
Evans ads. Williams,	203	Jeannerett ads. Carr, et. ux.	66
Everingham ads. Langton,	157	Jentry vs. Hunt,	410
Ex Parte, Doyley,	185	Johnson ads. Cochran,	21
F.		Jones vs. Jenkins,	494
Fleming vs. Mulligan,	173	Ives vs. Picket, et al.	271
Florence vs. McElmoyle,	26	Irby vs. Vining,	379
Floyd ads. Brooks,	364	Isaacs vs. McGrath & Jones,	26
Fisher ads. Rotercan and wife,	189	K.	
Fisk ads. Gerard,	11	Kennedy ads. Hardin,	277
Fords ads. De Villers,	144	Kerr ads. Miller,	285
Forbes vs. Foot,	351	Key ads. Ware,	373
Foot ads. Forbes,	331	Kyzer vs. Grubbs,	305
Fort ads. Morris,	397	L.	
Fox ads. Sargent,	369	Langton vs. Everingham,	157
Freeman ads. Turnipseed,	269	Latta vs. Surgner,	430
Furnan vs. Harman,	436	Lawton vs. Rivers,	445
Do. vs. Do.	442	Lazarus vs. Aubin,	134
G.		Lemaitre ads. McDowell & Black,	320
Gerard vs. Fisk,	11	Libenintz vs. Greenland,	313
Gibson vs. Peables,	418	Lightner ads. Martin,	214
Givens vs. Porteous,	48	Littlejohn ads. Smith,	362
Givens vs. Brandford,	152	Lowry ads. Youngblood,	39
Glenn vs. McCullough,	212	Lowry vs. Brooks,	421
Goodman vs. Parish,	259	Lynah vs. Com'rs Poor,	170
Gourdin vs. Davis,	514	M.	
Green ads. Carr,	75	McCall vs. Smith,	375
Greenland ads. Libenintz,	313	McClure vs. Mounce,	423
Gracy & Co. vs. Wright,	278	McCullough ads. Glenn,	212
Gracy & Co. vs. Coates,	224	McDonald ads. State,	299
Grubbs ads. Kyzer,	305	McDowell & Black v Lemaitre,	320
Gulden ads. State,	524	McElmoyle vs. Florence,	29
H.		McFee & Calder vs. So. Ca. Ins. Company,	503
Halder ads. State,	377	McGrath & Jones ads. Isaacs,	26
Hall ads. Wilkins,	205	Mahon ads. Cabiness,	273
Happoldt ads. Tunno,	188	Marsh ads. Ramsay,	252
Harrison ads. Nettles,	230	Marshall ads. the State,	63
Harrison vs. Cammer,	246		
Hardin vs. Kennedy,	277		
Harp ads. Caldwell,	275		

TABLE OF CASES.

7

Martin vs. Lightner,	214	Rogers ads. City Council,	494
Martin & Patrick ads. Snel-		Rotereau and wife vs. Fisher,	189
grove,	241	Russell ads. Vause,	329
Mathewson vs. Moore,	315		
May vs. Walters,	470	8.	
Mazyck ads. State,	473	State vs. Cole,	1
Merrit vs. Westendorff,	326	State vs. Billis,	12
Miller ads. Power,	220	State vs. Stephens, et al,	33
Miller vs. Kerr,	285	State vs. Clarke,	47
Miller & Brown vs. So. Ca. Ins.		State vs. Allen,	55
Company,	336	State vs. Marshall,	63
Minott vs. Elliott,	125	State vs. Applegate,	110
Mickle vs. Baker,	250	State vs. Cole,	117
Montague ads. State,	257	State vs. Duncan,	129
Moore ads. Matherson,	315	State vs. Youngblood,	241
Morris vs. Fort,	397	State vs. Walsh,	248
Mounce vs. McClure,	426	State vs. Montague,	257
Mulligan ads. Fleming,	173	State vs. McDonald,	299
		State vs. Williams,	301
N.		State vs. Dupont,	334
Nesbit ads. Thompson,	471	State vs. Halder,	377
Nettles vs. Harrison,	230	State vs. Williams,	383
Nicholson & Co. vs. Withers,	428	State vs. Wilson,	393
Nowel, Ex Parte,	453	State vs. Faulkener,	438
Noyes vs. Haynesworth,	367	State vs. Calder,	462
		State vs. Mazyck,	473
O.		State vs. Taylor,	483
Ogier vs. Higgins,	8	State vs. Gulden,	524
Owens ads. Boyce,	208	State vs. Thomas,	527
		Sadler ads. Cohen,	239
P.		Sargent vs. Fox,	309
Parish ads. Goodman,	259	Sargent vs. Wilson,	512
Parks vs. Duke,	380	Scott vs. Woodward,	161
Patterson ads. Williamson,	132	Schatzill vs. Bolton,	478
Peebles ads. Gibson,	418	Sharp ads. Herbemont,	264
Peck vs. Wakely & Wilson,	279	Shooler ads. Black,	293
Pelzer vs. Cranston,	328	Smyth ads. exr's. Wigfall,	135
Picket ads. Ives,	271	Smith vs. Littlejohn,	362
Pemble vs. Clifford,	31	Smith ads. McCall,	375
Platt ads. Cantey,	260	Smith ads. Howell,	516
Plunket vs. Bowman,	138	Snelgrove vs. Martin & Patrick,	241
Porteous ads. Givens,	48	S. C. Ins. Comp. ads. Miller &	
Potter ads. Allen,	323	Brown,	336
Plunket ads. Boman,	518	Stockman vs. Riley,	398
Power vs. Miller,	220	Steel vs. Sawyer & Steel,	459
Prioleau ads. De Villers,	144	Stockdale ads. Young,	531
P—r vs. Bogan,	386	Stephens ads. Treasurers,	107
Prescott vs. Hubbell,	64	Stover vs. Duren,	266
		Street ads. Haslet,	310
R.		Sumter ads. Righton,	412
Ramsay et al. vs. Marsh,	252	Surginer ads. Latta,	430
Read ads. Duncan,	167		
Reeves ads. Ashley,	432	T.	
Richardson vs. Whitfield,	148	Talvande vs. Cripps,	164
Reeder ads. Willard,	369	Talbot vs. Mason,	440
Righton vs. Sumter,	412	Tavel vs. Barre,	201
Rhodes ads. Vaughan,	227	Taylor ads. State,	483
Riley ads. Stockman,	390	Thomas vs. Daniel,	354
Rivers ads. Lawton,	445	Thomas ads. State,	524
Roberts vs. Roberts,	268		

TABLE OF CASES.

Thompson <i>vs.</i> Nesbit,	471	Ditto ditto, <i>vs.</i> Bauxbaum	
Thompson <i>ads.</i> Brown,	476	& Trescott,	139
Thompson <i>vs.</i> Caldwell,	390	Wilcox <i>ads.</i> Day, Downs &	
Tolman <i>vs.</i> Thompson,	43	Eastburn,	454
Trapier <i>vs.</i> Wilson,	191	Williams <i>vs.</i> Evans,	203
Treasurers <i>vs.</i> Stephens,	107	Williams <i>ads.</i> State,	301
Tunno <i>vs.</i> Happoldt,	188	Willard <i>vs.</i> Reeder,	369
Turnipseed <i>vs.</i> Freeman,	269	Williams <i>ads.</i> State,	383
V.			
Van Boven <i>ads.</i> Council,	465	Williamson <i>vs.</i> Patterson,	132
Vaughan <i>vs.</i> Rhodes,	227	Wilks <i>vs.</i> Brummer, <i>et ux.</i>	178
Vause <i>ads.</i> Russell,	329	Wilkins <i>vs.</i> Hall,	205
Vining <i>ads.</i> Irby,	379	Williamson <i>vs.</i> Cumming,	250
W.			
Walsh <i>ads.</i> State,	248	Wilkins <i>ads.</i> Harrington,	289
Wakely & Wilson <i>ads.</i> Peck,	279	Wilson <i>ads.</i> State,	393
Ware <i>vs.</i> Key,	373	Wilson <i>ads.</i> Sargent,	512
Ware <i>vs.</i> Weathnal,	413	Wilson <i>ads.</i> Trapier,	191
Washington <i>ads.</i> Hynman,	493	Witherspoon <i>vs.</i> Witherspoon,	520
Walters <i>ads.</i> May,	470	Woodward <i>ads.</i> Scott,	161
Whitfield <i>ads.</i> Richardson,	148	Wright <i>ads.</i> Gracy,	278
Weathnal <i>ads.</i> Ware,	413	Y.	
Westendorf <i>ads.</i> Merrit,	326	Yates <i>vs.</i> Bond,	382
Wigfall, ex'rs. <i>vs.</i> Smyth,	235	Young <i>vs.</i> Stockdale,	531
		Youngblood <i>vs.</i> Lowry,	39
		Ditto <i>ads.</i> State,	241

ERRATA.

PAGE.	LINE.	
205	4	read <i>permit</i> for " <i>prevent</i> ."
207	32	read <i>naked</i> for " <i>secret</i> ."
211	4	strike out " <i>on</i> " and insert it between " <i>has</i> " and " <i>the</i> ."
211	5	insert " <i>or</i> " between " <i>debtor</i> " and " <i>where</i> ."
213	14	strike out " <i>there</i> ."
215	20	read <i>cure</i> for " <i>care</i> ."
216	32	read <i>our set off law</i> , for " <i>one set of cases</i> ."
322	6	read <i>sum</i> for " <i>same</i> ."
327	17	read <i>future</i> for " <i>further</i> ."
327	27	after " <i>events</i> ," put a period, and erase it after " <i>instance</i> ."
437	14	read <i>now</i> for " <i>not</i> ."

CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, JANUARY TERM, 1822—CHARLESTON.

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	RICHARD GANTT,
ABRAHAM NOTT,	DAVID JOHNSON,
CHARLES J. COLCOCK,	JOHN S. RICHARDSON,
DANIEL ELLIOTT HUGER.	

THE STATE vs. J. COLE.

No doctrine is better established than that where one commits an offence, which is made felony by statute, and then the statute be repealed, he can not be punished as a felon in respect of that statute: and the doctrine applies as well to the imposing and recovering of penalties, as to the creating and punishment of felonies.

The patrol act of 1819, is only a re-enactment of the act of 1809, and the former acts, with some small alterations.

The act of 1819 and 1809, differ in three particulars:

1. As to the amount of fines.
2. In the person before whom the penalty is to be recovered.
3. In the appropriation of the fines.

MOTION for a prohibition made before Judge *Richardson*, to prevent the collection of certain fines imposed by Captain *Cole* on *William Brisbane*, for the non performance of patrol duty.

The suggestion stated a variety of grounds, but the motion was granted, on the ground that the act under which the fines were imposed, had been repealed by a subsequent act of the Legislature. A motion was now made to reverse the decision of the presiding Judge, and to dismiss the rule, because the act has not been repealed, so far, at least, as fines had been imposed, prior to the passage of the last act, which is considered as the repealing act.

On the part of the appellant, Mr. *Prioleau* contended that where an act of the Legislature repealed a former act imposing a penalty, such penalty could not be recovered after the repeal of the law by which it was imposed ; and that the act of 1819, regulating the performance of patrol duty, did repeal the old act of 1809, on the same subject, both by a repugnancy in its provisions, and by an express clause to that effect ; and that there is no clause in the latter act providing for the enforcement or recovery of the penalties imposed by the former act. To support these positions, he relied on 1 *Hale*, 291. 1 *Wm. Blackstone*, 451. 4 *Dallas*, 373-4. 1 *Cranch*, 110. 5 *Do.* 281.— 6 *Do.* 329.

The *Attorney General* did not controvert the general position, that, where a statute creating an offence is repealed by a subsequent statute, that no punishment can be inflicted after the repeal of the first statute ; but contended that the act of 1809, was neither virtually nor actually repealed by the act of 1819.

Mr. Justice *Colcock* delivered the opinion of the court :

No doctrine of law is better established than that where one commits an offence which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute. (1 *Hawk. P. C.* 306, *Sec.* 10. 1 *Hale*, 219.) And the doctrine applies as well to the imposing and recovery of penalties, as to the creating and punishment of felonies. The reason of the law is obvious ; it is not only unwise and impolitic, but it is unjust to punish a man for the commission of an act which the law no longer considers as an offence. The policy of a country may require the prohibition of certain acts, or the performance of certain duties for a time, after which, the acts may be innocent, and the duties not required. It would not be less absurd to punish a man for an act which is not illegal at the time the punishment is inflicted, than to punish him for one which never has been declared illegal ; and upon an examination of the authori-

ties relied on by the counsel for the appellant, it will be found, that they are all embraced within this doctrine.— They are all cases where the laws which subjected the offender to a penalty, are clearly and fully repealed; or where a benefit was conferred and afterwards taken away. The first is *Miller's case*, 1 *Wm. Black.* 451, where the authority to discharge *Miller* from imprisonment had been taken away before he was discharged; and it is said even offences against the clause, could not now be permitted, unless by a provision to that effect, and therefore, (says the case) a clause was introduced into the repealing law to that effect. The next is the case of *Passamore*, (4 *Dallas*, 372,) who was indicted in 1804, under the provisions of the bankrupt law of 1800, which had been repealed in 1803. I say he was indicted under the act, because it appears to have been such an indictment, from the argument of the District Attorney, (*Mr. Dallas*,) who contended, that notwithstanding the repeal of the act, and the form of the indictment, the defendant might be convicted as for a common law offence, and the words “against the form of the act,” be regarded as surplusage. But to this, there was the insurmountable objection, that the law being repealed, the act was extra-judicial, and consequently there was no law of force which declared the act to be perjury, or by which it could be so considered. The next is the case of *Yeaton et. al. vs. U. States*, 5 *Cra.* 281. This was a case in the Admiralty, and the circumstance of a judgment having been rendered before the repeal of the law, does not distinguish it from the other cases relied on, when it is recollected, that in this jurisdiction, cases in appeal are to be heard *de novo*, as if no sentence had been passed. When the case came before the court on appeal, the law which made the act criminal, was repealed, and being considered as not before tried, the general doctrine applied. It was a case in which an attempt was made to recover a penalty after the expiration of the law which imposed it. The case from 6 *Cranch*, 329, was also an admiralty case, to which the same observations are appli-

cable. But the case before us is one of a different character, and is distinguishable in two important particulars.— The act of 1819, is only a re-enactment of the act of 1809, and the former acts, with some small alterations. It is a continuation of the same system of police which has been in operation for upwards of seventy-six years. There is no repugnancy in these acts ; all of them require the performance of that duty which the Relator neglected to perform : all of them imposed a penalty on the non performance, and all of them recognize the old and long established jurisdiction, by which the fines are to be recovered.— The act of 1819, and that of 1809, differ in three particulars. 1st. As to the amount of fines. By the act of 1809, the fine imposed was five dollars, and five per cent. upon the amount of the last general tax. By the act of 1819, the fine is two dollars, and ten per cent. upon the tax.— 2d. In the person before whom the penalty is to be recovered. By the act of 1809, it was to be recovered before the captain. By the act of 1819, it is to be recovered before the captain and his officers, who are called a court-martial. And lastly, in the appropriation of the fines.— In the act of 1809, it was to go to the use of the company. In that of 1819, it is to go to the use of the poor. The first point of difference does not constitute a repugnancy, for the act of disobedience is still held criminal, and a fine is still imposed ; and being increased in amount by the last law, shews that the act is considered more criminal, and consequently furnishes a stronger reason, why it should be punished ; and this points to the first important distinction between this case and those cases in which it ceases to be necessary to punish the act at all, because it is no longer an offence. The second point of difference does not constitute a repugnancy. It is the same jurisdiction to recover these fines : no other judicial power is committed to it. The court consists of three Judges instead of one, but this does not make the jurisdiction different. When a Judge is added to the Common Pleas Bench, as was lately done, we do not hold that the jurisdiction is

changed. It is still the same court, and possesses the same powers, although the number of Judges be different. But if the jurisdiction is changed, still the offence would be punishable ; for where “the offence was punishable before the statute, which prescribes a particular method of punishing it, there such particular method is cumulative.” (2 *Hawk.* 302, note 3.) And in page 18, of the same authority, it is said, “affirmative statutes shall not, without express words, be construed to take away the jurisdiction of an ancient court.” And the power of collecting the fines was given to the captain of the respective companies in 1746, and has been exercised by them ever since, until 1819. The third point of difference cannot affect the question ; for the appropriation of the fine cannot take place until after the determination of the question, whether it can be recovered. Having shewn that there is no repugnancy between the latter and former laws in those particulars which can effect the Relator, it is only necessary to remark on the repealing clause, that it only repeals so much of the former laws as are repugnant to the provisions contained in it.

The second important particular in which the case before us differs from the cases relied on is, that judgment having been rendered on a matter still held criminal, and our court possessing no such power as the Admiralty court of trying the case *de novo*, our judgment must have relation back to the former judgment. The question before us now is, not whether the Relator is to be fined, and in what amount ; but whether he has been legally fined, and in a proper amount, and whether judgment and execution can now be enforced ; and of this, the court entertain no doubt. The motion is therefore granted.

Justices *Bay*, *Gantt* and *Johnson*, concurred.

Nott, Justice.

I concur in this opinion, as well for the reasons given by my brother *Colcock*, as for the further reason, that the

executions were issued, and one of them actually levied before the last act was passed.

Prioleau, for the appellant.

Hayne, Att'y. Gen. contra.

DAVID F. AXSON *vs.* SETH BLAKELY & WIFE.

The promise of a wife to pay a debt contracted by her previous to marriage, will not take the case out of the statute of limitations.

TRIED before his honor Judge *Colcock*, in Charleston, May Term, 1821.

This was a summary process to recover fifty dollars, with interest, on account of so much money had and received by the said *Susannah*, before her marriage with the said *Seth*, from the father of the petitioner, on his account, and to be paid to him. The date of the account sued for was in 1803.

Pleas, *non assumpsit* and statute of limitations.

The plaintiff produced a witness, who testified that previous to the marriage of the defendants, *Susannah* admitted that she was indebted to the plaintiff 50 dollars, and promised to pay, when able. It did not appear that this promise was made within four years before the process issued, and the court was about to decree in favour of the defendants, when the witness went on further to state, that since the marriage, about eighteen months ago, *Susannah Blakeley* admitted that she was indebted to the plaintiff, and promised to pay. That though this was in the presence of her husband, he, by no means assented, but declined paying it.

On behalf of the defendants, it was contended, that the debt was barred by the statute of limitations, as there was no promise of the husband, express or implied, within four years. That there was no proof of application being ever made to him. That the debt was barred before mar-

riage, and after marriage he had not revived it by any promise to pay. That the promise of the wife was, in law, as no promise. That she could not have been heard, even if sworn in open court; much less could her bare admissions, out of court, be received against her husband; a wife being incapable of binding herself, or her husband, by her assent to any agreement *in pais*. The decree however, was for the plaintiff, and a motion was now made to reverse the decree of his honor, for the reasons above alleged.

Mr. Justice *Colcock* delivered the opinion of the court:

It was conceived that this case might form an exception to the rule, that a feme covert can not bind her husband without his assent. It appearing that the debt was justly due, and the wife desirous to pay it, I thought it might be distinguished from cases where the contract itself was originally entered into after marriage. First, because one so contracting with a feme covert might be on his guard. Secondly, because the husband might, in reality, be benefitted by the debt; and lastly, because the effect of the application of such a rule would be to destroy all confidence in women, while single, and probably lead to that very disagreement between man and wife, which it is the policy of the rule to prevent; for an honorable wife, desirous to discharge a debt justly due, and long due by the kind indulgence of a brother, (as in this case,) must feel indignant at the idea of her husband shielding himself under the law. My brethren however think the rule applicable to the case, and the motion is consequently granted.

Justices *Nott*, *Huger*, *Gantt*, *Richardson* and *Johnson*, concurred.

White, for the motion.

———, contra.

JNO. M. OGIER vs. HIGGINS.

Bail is not discharged in consequence of the plaintiff taking out a *fi. fa.* previous to the issuing of a *ca. sa.*

IN the city court, June sittings, 1821.—This was a *scire facias* against bail.

Plea, that the plaintiff, after entering up judgment, took out a *fi. fa.* against the property of the principal, before taking out a *ca. sa.* against his person, and the bail is therefore discharged.

Replication, that the *fi. fa.* was returned *nulla bona*, and the bail is not discharged in law.

To this there was a demurrer.

The Recorder overruled the demurrer, and decided that the bail was not discharged.

A motion was now made to reverse this decision, on the ground that the plaintiff, after having recovered judgment against the principal, did not proceed in the first instance against his person, but on the contrary took out execution against his goods and lands by *fi. fa.* and thereby discharged the bail.

It was contended on the part of the bail, that by taking bail, it is implied that the plaintiff intended to look to the person alone of his debtor for satisfaction, and that therefore he is bound to proceed against that, and not against his goods and chattels: and that bail are sureties, and entitled to all the protection which is afforded to sureties generally; and that by issuing a *fi. fa.* time is given to the debtor, which was not intended by the original contract with the bail. And in support of this, the counsel relied on a *dictum* in 2 *Sellon*, p. 44; and the case of *Rathbone vs. Warren*. (10 *Johnson*, 594.)

On the part of the plaintiff, it was insisted, that no such implication arises from taking bail, and that although bail are considered as sureties, and are relieved when the nature of the contract is changed; yet, that the act of suing out a *fi. fa.* in the first instance, has never been held to

January Term.

operate as a discharge to the bail, and the counsel relied on the case of *Olcott & Lilly*, (4 *Johnson*, 411.)

Mr. Justice *Colcock* delivered the opinion of the court:

There is nothing in the nature of the contract entered into by bail, which implies that the plaintiff intends to release any remedy which he may have for the recovery of his debt. Such a position operates not only to the injury of the plaintiff, but to that of the bail also. Bail is only an additional security to the plaintiff for the recovery of his debt; and the responsibility of the bail is only conditional. They pay the debt, if the debtor does not pay it; or surrender him, if he does not surrender himself. What objection then can there be to the plaintiff's proceeding in the first instance against the property of the defendant?—If the bail are made to pay the debt of the principal, they may resort to the property of their principal; and is it not to their advantage, that this should be done in the first instance? It cannot be denied, that bail, like other sureties will be relieved, when the nature of the contract is changed, or where time is given to their prejudice; but neither has been done in this case. The contract is not altered, but is in fact pursued, for the bail are to pay on the failure of the principal to do so. This certainly implies that the plaintiff may endeavour to make him do so before he applies to the securities; and as to time, there can not be, and therefore there is not any day fixed, when the bail are to be called on. It cannot be known when judgment will be obtained, and when obtained, whether there may not be an appeal. So that the contract, as to time, is, that when they are called by a *ca. sa.* being issued against their principal, the debt must be paid, or his body delivered. But there is a circumstance with regard to bail, which differs their situation from ordinary sureties. It is their right to surrender their principal, and this must not be lost sight of when they apply for relief. If they are not prejudiced in this particular, they ought not to be relieved; for the law is made for the vigilant, &c.

Knowing their responsibility and their privilege, they should avail themselves of the latter to avoid the former. In the case of *Olcott vs. Lilly*, chief Justice *Kent*, in delivering the opinion on this ground, which was taken in the case, says—"but it cannot be doubted that the plaintiff may resort to the *fi. fa.* and *ca. sa.* in succession; and that after levying a part by *fi. fa.* he may sue out a *ca. sa.* or bring an action of debt for the residue; and he refers to 4 *Bos. & Pul.* 134. This is for the advantage of the bail. It lessens the demand for which they may be responsible, and it does not deprive them in the meantime of the right of surrender. There is no reason for saying that the bail are discharged, if the plaintiff elects to sue out a *fi. fa.* in the first instance; no such plea is to be found, and it is repugnant to the condition of their recognizance. In *Heath vs. ———*, of Hall, (1 *Freeman's Rep.* 344, p. 425,) it was admitted, that though a part of the debt be levied on the principal, yet the bail are liable for the remainder. But if the common law on this subject did admit of doubt, the act of 1785, regulating the proceeding against bail to the sheriff, authorizes the issuing either of a *fi. fa.* or *ca. sa.* and introduced a practice of issuing a *fi. fa.* in most cases against the principal, even in cases of bail to the action, before they proceeded by *ca. sa.* to fix the bail. Indeed, so general has been the practice, that the court has been called upon to decide whether according to the provisions of our acts, it is not indispensably necessary to issue a *fi. fa.* in the first instance.

The motion is dismissed.

Justices *Bay*, *Richardson*, *Huger*, *Nott* and *Johnson*, concurred.

Simons, for the motion.

King, contra.

SAMUEL H. FISKE *ads.* PETER GERARD.

To induce a belief that a receipt was endorsed upon a note to reduce the balance within the summary process jurisdiction, it must be proved, and will not be presumed.

IN the city court, July Term, 1821.—This process was brought for the recovery of an account, amounting to \$ 33 and for \$ 15 50, the balance on a note, making together \$ 48 50. The note was originally given for \$ 65 50, with interest from ——— 1817, a receipt for \$ 50 was indorsed upon it by the plaintiff on the 2d of April, 1819. The defendant's counsel contended that this case was not within the jurisdiction of the court, because the receipt by the plaintiff being his own act, if admitted, it would establish the principle that a party could create a jurisdiction for himself. The objection was overruled, because it was not proved, or from any circumstance was it to be implied, that the receipt was colorable, merely for the purpose of giving jurisdiction. A decree was given for the plaintiff for \$ 48 50, with interest on \$ 15 50, from the 2d of April, 1819. Notice was served upon me that a motion would be made to set aside the decree upon the ground which is included.

WM. DRAYTON, *Recorder.*

Mr. Justice *Colcock* delivered the opinion of the court:

The case of the executor of *Taylor vs. Rodrick McDonald*, (2 *Con. Rep.* 178,) relied on in support of this application was decided on a state of facts directly opposite to those reported by the Recorder in this case.— There it appeared that “the Testator himself had given credit for a payment which the defendant knew nothing of,” to take his claim out of the operation of the statute of limitations. There is nothing in the case which says that receipts are to be presumed colorable. The contrary presumption is the correct one.

The motion is dismissed.

Justices *Nott, Bay, Richardson, Gantt* and *Johnson*, concurred.

Clarke, for the motion.

Egleston, contra.

JAMES BILLIS *ads.* THE STATE.

Objections to a juror come too late after verdict.

It is no objection to a juror, on an indictment for passing a counterfeit bill on the Bank of the State of South-Carolina, that he is a director of the bank; for he has no other interest in the institution than that which is common to all the citizens of the state.

It is now well settled, that the different clauses of the Constitution of the United States are so to be construed as to effect the purposes for which they were intended. In conformity with this rule, it has been decided, that although the states retain all powers not taken away, yet, when a power is granted to the national government, the exercise of which by the states would be inconsistent with the grant, that power is constructively withheld from the states.

The bills of credit, prohibited to be issued by the states, by the 10th sec. of the 1st article of the Constitution of the United States, are promissory notes or bills for the payment of which the *faith of the state only is pledged*. They are such bills as were emitted by Congress and the different states anterior to the adoption of the Constitution.

Although throughout the resolutions of Congress, and the acts of our Legislature, "paper money" and "bills of credit" are used as synonymous, it no where appears that "legal tender" and "bills of credit" were regarded as such.

As a note of "the Bank of the State of South-Carolina" is a bill drawn on the credit of a particular fund, set apart for that purpose, it is not a bill of credit, within the meaning of the Constitution.

FORGERY.—The prisoner was indicted for having passed a counterfeited note of the Bank of the State of South-Carolina, knowing it to be a counterfeit. The note in question was a two dollar bill, altered with much skill to twenty dollars. It had been passed to one of the wit-

nesses near dark, on a Saturday evening, who was requested to change it to enable a captain of a ship, as was pretended by the prisoner, to pay off his men. Some two or three days after, the bill was discovered to be a forgery, and the prisoner traced to his lodgings, where he was denied to the witness. A warrant was then obtained, and the prisoner taken and carried before a magistrate, to whom he confessed that he had passed the bill, but affirmed that he had received it from a Mr. *Rogers* for ship-carpenters work. He was required to say where *Rogers* lived, and to accompany the constable to his lodgings; but this he refused to do. To the captain of the city guard, the prisoner had confessed two days before he was taken into custody, that he had received a forged twenty dollar note, and promised to point out the person from whom he had got it, and to discover the persons whom he represented as being concerned in the forgery of the note which he said he had received. He exhibited it; it was also a two dollar note of the Bank of the State of South-Carolina, skilfully altered to a twenty. This note he pretended to have received from a man by the name of *Rogers*, who he said was employed in a fishing smack. No such person however was found, nor did the prisoner discover any of the other persons to whom he had alluded. It appeared further, that he had been a clerk in a shop near the market.

It was left to the jury to decide whether he was guilty or not, and they found a verdict of "guilty."

From this verdict he now appealed and moved for a new trial, on the following grounds, viz:

1st. That the verdict was not authorized by the evidence.

2d. That the foreman of the jury who tried the prisoner, was a director of the Bank of the State of South-Carolina, which was not known to the prisoner or his counsel prior to the verdict.

The prisoner also moved for an arrest of judgment, on the ground that the bills of the Bank of the State of South-

Carolina are void, inasmuch as they are issued on the credit of the state, which is prohibited by the 10th section of the 1st article of the constitution of the United States, and being void, are not susceptible of forgery.

Mr. Justice *Huger* delivered the opinion of the court :

The evidence in this case having been properly submitted to the jury, and sufficient in the opinion of the court to support the verdict, the motion for a new trial must fail on the first ground.

Objections to a juror come too late after verdict. It was so ruled in the case of the *State vs. Fisher*, and has been frequently recognized as settled doctrine in this court. The objections to the foreman however, in this case, was entirely without foundation. He owned no stock in the bank, and could have no other interest in the institution than is common to all the citizens of the state. He does not receive even a pecuniary compensation for his services at the board. Even before trial, such an objection could not have prevailed. The motion for a new trial must therefore fail on both grounds.

The motion in arrest of judgment makes three questions for the consideration of the court.

1st. What are bills of credit within the meaning of the constitution?

2d. Are the notes issued by the Bank of the State of South-Carolina, such bills of credit?

3d. If the notes of that bank are bills of credit within the meaning of the constitution, will the passing such bills, knowing them to be counterfeited, be an offence within the meaning of the act?

These questions will be considered in the order in which they are stated.

Whatever doubts may have once existed, it is now well settled, that the different clauses of the constitution are so to be construed as to affect the purposes for which they were intended. In conformity with this rule, it has been decided, that although the states retain all powers not ta-

ken away, yet, where a power is granted to the national government, the exercise of which by the states, would be inconsistent with the grant, that power is constructively withheld from the states. This rule is as applicable to the provisions which limit the powers of the states, as to those which confer powers on the national government. The object of the limitation must give construction to the words in which it is expressed. The words of the constitution are "no state shall coin money, emit bills of credit, make any thing but gold and silver a legal tender, &c." The term bill of credit seldom occurs in the books; but when used, is always synonymous with letter of credit, and this appears to be its only technical signification. In its literal and more general signification, a bill of credit is a promise, undertaking, or order in writing, for the payment of money issued on the credit of some person or persons, or on the credit of some particular fund. In this sense, promissory notes; bonds for the payment of money; certificates of stock; bills of exchange; checks on a bank, and orders drawn by an officer of a government, or a corporation, on funds set apart, and exclusively appropriated for the redemption of such order, are bills of credit. That "bills of credit" are not used in their technical sense in the constitution, is too evident to be disputed. No evils had ever been experienced, and none were to be anticipated, from the emission of letters of credit by the states.— That they were not used to the extent of their literal and general signification, is almost as apparent. No injury had been experienced from the states borrowing money, and issuing therefor certificates of stock, or bonds for the payment of money. Nor had bills of exchange, or checks for money, or orders drawn on particular funds, produced any of those mischiefs, against which, it can be supposed, the constitution intended to guard. Contemporaneous constructions of the constitution are to be respected, (*Stuart vs. Land*, 1 *Cranch*, 303,) and they have been on these points, in the language of a learned Judge, of the most forcible nature.

Every state in the union has, ever since the adoption of the Constitution, issued certificates of stock, bills of exchange, orders drawn on particular funds, and in doing so, have never been supposed to violate the constitution. If letters of credit; bills of exchange; bonds for the payment of money; certificates of stock and orders drawn on particular funds by the officers of government, be not within the meaning of the words bills of credit, as used in the constitution, it would seem to follow that promissory notes or bills issued on the credit of the states, are the bills which it intended to prohibit. This construction deserves some support from the practice of the different states. Although they had been in the habit of emitting these bills in quantities, before the adoption of the constitution, no one is known to have done so since, unless the notes issued by the bank of this state be such bills. This appears almost to amount to a construction by common consent. A reference however to the peculiar circumstances of the country for years, prior to the adoption of the constitution, will best shew the evil against which the prohibition was intended to guard. Congress not having the power of raising a revenue by taxation, were obliged, throughout the revolutionary war, to issue paper money to defray their expenses. The states unwilling to use the power they possessed, pursued the same course, and defrayed their expenses in paper money of their own creation. These different emissions of paper money constituted the currency of the country. In the resolutions of Congress, as well as the acts of the different Legislatures, these emissions of paper money, were called bills of credit, and were, in fact, promissory notes issued on the credit of the different governments. As no funds were set apart or appropriated for the redemption of these bills, they depended entirely on the faith as well as ability of the different governments for payment, and began to depreciate as soon as they exceeded the purposes of domestic exchange. As issue was made, depreciation followed; and ultimately, so great was the issue by Congress and the states, that \$100 of this paper was

not worth more than a single dollar in specie. The evils which always attend a depreciating currency were sensibly felt, and in the language of the Historian of Carolina, they were equal to all that could follow an agrarian law. To prevent a recurrence of these evils, which had been produced, in a great measure, by the state governments, they are prohibited from issuing such paper in future; that is, promissory notes, for which, only their faith was pledged. Had adequate funds been appropriated for the redemption of this paper, or could it have been converted, at pleasure, into gold and silver, depreciation would not have taken place, and the evils complained of, would not have been experienced. A bill of credit then, within the meaning of the constitution, is a promissory note or bill issued exclusively on the credit of the state. It has been contended on the part of the state, that a bill of credit within the meaning of the constitution, implies a legal tender. That the states, therefore, are only prohibited the emission of such bills of credit as they shall make a legal tender. Although throughout the resolutions of Congress, and the acts of our Legislature "paper money" and "bills of credit" are used as synonymous, it no where appears that "legal tender" and "bills of credit" were regarded as such. The Legislature of this state as early as 1704, and frequently afterwards, prior to the revolutionary war, issued bills of credit, without making them a legal tender. Nor were the bills issued by Congress made such by their resolutions. On the contrary, the articles of confederation under which they acted, gave them no power to make a legal tender. And so perfectly was this understood, that it appears, when it was thought necessary to adopt some measure to arrest the progress of depreciation, a resolution was passed, declaring that they ought to be so regarded, and denouncing at the same time all who should not receive them as gold and silver. When it was found that a paper denunciation, although aided by a strong patriotic feeling, was not sufficient to resist a moral necessity, they recommended to the states to make congressional

bills of credit a legal tender, which was accordingly done. About the same time, the bills issued by the states were also made a legal tender. But prior to this, the paper money both of the States and Congress were called, and so denominated in their acts and resolutions "bills of credit." Independantly of the certain import of these words in the resolutions of Congress and the different acts of the Legislature, from which no doubt they were taken by the framers of the constitution, it would be impossible to adopt the construction contended for, without making the prohibition entirely nugatory. For the words which immediately follow the prohibition, are "no state shall make any thing but gold and silver a legal tender." If no state can make any thing but gold and silver a legal tender, bills of credit could not be emitted as a legal tender, even were the words "bills of credit" entirely expunged. It cannot be contended that they have no meaning, and if they have any, they must import something else than bills which are a legal tender. The constitution in prohibiting the states from coining money; emitting bills of credit, and making any thing but gold and silver coin a tender in payment of debts, after having given to Congress the power to coin money and regulate the value thereof, and of foreign coin; (the last of which powers is necessarily exclusive,) evidently intends to place beyond the control of the states, the currency of the nation. The effects of a base currency were well known to its framers, and they could not have been ignorant of the great inconvenience that must result from having as many different currencies as there were states. Give however to the states the power of emitting bills on their own credit, even though they be not a legal tender, and the currency of the country must be very much under their control. It is, then, not only in conformity to the import of the words as used in the resolutions of Congress and the Acts of the Legislature, but to the plain meaning and spirit of the constitution, that bills of credit should not be understood to imply a legal tender.

Having shewn that bills of credit, within the meaning

of the constitution, are such bills as were emitted by Congress and the different states, anterior to the adoption of the constitution, and that such were issued exclusively upon the credit of Congress and the states,—the next question to be considered is,—are the notes issued by the Bank of the State of South Carolina such bills?

It appears from the charter of the Bank, that its capital was furnished exclusively by the state. That the president and directors who manage its concerns, are all appointed by the state. Its capital consisted of stock of the United States, owned by the state, which has been converted into money; stock which the state owned in the different banks of this city, and which had also been converted into money; the bonds due to the Paper Medium Loan Office, a large proportion of which has been paid; and balances which were in the treasury at different periods, since its establishment. In all, equal to \$1,100,000. This capital appears to be as real and substantial as that of any other bank. It is authorized, like other banks to issue notes payable to bearer, and redeemable in gold and silver on demand. The capital is pledged for the payment of these notes; and the president and directors can be sued in the same manner, and with as much facility as those of other institutions. It differs in no respect from the other banks, but in being owned by the state, and being more restricted in its issue of paper. As in some of the other banks, the stockholders are responsible in the event of insolvency. A clause in the charter provides for the payment of such drafts as may be drawn by the treasurer of the state. The amount of notes issued depends, within the limits prescribed by the charter, upon the discretion of the president and directors, and their discretion must be governed by the ability of the bank, on the one hand, and the demand for loans, on the other. In this respect, they differ widely from the bills emitted by Congress and the States.—They are redeemable on demand, in gold and silver, and if not paid, according to their tenor, the president and directors are liable to an action at law to the holder.

In these respects they differ still more from the revolutionary currency. A note of this bank is an order drawn by the president and directors on the cashier, to pay the bearer the amount of the note, out of the monies provided for that purpose by the state. This does not differ from the orders which have been drawn annually, ever since the adoption of the constitution, by the presidents of the senate, and speakers of the house of representatives on the treasurers, for the pay of the members of the Legislature; or from the orders drawn by the clerks of courts for jurors, or of the treasurer for the payment of the different officers of the government on a bank, in which, the funds of the state may for convenience, have been deposited. It is true, these orders differ from bank notes in form, but not in substance. So little do they differ in form, that it could be attended with no bad consequences to give to both the same form. Both are bills of credit drawn on a particular fund. Bank notes are bills drawn on the credit of the capital of the bank, vested in the president and directors as trustees for that purpose, and which cannot morally or legally be diverted to any other purpose, not even by the state. The clause in the charter pledging, over and above the capital, the faith of the state, in case of insolvency, for the redemption of the notes, cannot vary the character of the bill, which is substantially an order on the capital or fund pledged. The faith of the state is equally pledged for the redemption of the orders of the president and speaker and treasurer. Nor can the clause requiring the bank to pay such drafts as may be directed by the Legislature, alter the character of the bills. This when taken in connection with the other clauses of the act, implies no more than an occasional accommodation to the Legislature, which is usually done by all banks to their best customers. But this very provision shews how independent of their control, their Legislature intended to make the institution. As a note of the Bank of the State, is a bill drawn on the credit of a particular fund, set apart for that purpose, it is not a bill of credit, within the meaning of the constitution.

The consideration of the third question has become unimportant to this case. Although I entertain no doubts on this question, and regard it as immaterial to the defence, whether the notes of the bank be bills of credit or not, within the meaning of the constitution, yet as some doubts are entertained by one of the members of the bench, the effect probably of its unimportance in this case, the opinion of the court will not now be expressed on this point.

The motion in arrest of judgment, as well as that for a new trial, must be dismissed.

Justices *Nott, Colcock, Bay, Richardson, Johnson* and *Gantt*, concurred.

Clarke, Elliott and Holmes, for the motion.

Petigru, Att'y. Gen. contra.

THOMAS COCHRAN vs. The Hon. WM. JOHNSON.

When a person employs a vendue master to sell property, at a particular per centage commission, the vendue master is not entitled to a per centage upon a bid not complied with. The object of the vendor is not accomplished, nor the duties of the vendue master performed, until the conditions of the sale are complied with.

THIS was an action brought to recover five per cent. commissions on the sale of several lots of land. The defendant, as executor of his father, wished to sell property to a considerable amount in the city of Charleston. He agreed to allow the plaintiff, who was a vendue master, twelve and a half per cent. on so much as he should sell. Several lots were accordingly sold at different periods, and the purchase money was received by the plaintiff. On the 24th June, 1818, other lots were offered for sale, and knocked off to Mr. L. at the price of \$11,740; the purchaser refused to comply with the conditions of the sale, and the property was advertised under the vendue act to

be re-sold at the risk of the first purchaser. Before the re-sale was effected, the plaintiff paid the defendant the sums which he had received for the lots actually sold, deducting therefrom not only twelve and a half per cent. commissions on the property so sold, but the same commissions on \$11,740, the sum at which the last mentioned lots had been knocked off to Mr. L. After this, the property was advertised and re-sold, and brought \$9,000; the purchase money was paid or settled for with the defendant himself. As the act directs, the vendue master commenced an action against Mr. L. for the loss and expenses sustained by his declining to comply with the conditions of the first sale, and for commissions. In the progress of this suit, it appeared that either Mr. L. was insolvent, or so difficult of access, that the plaintiff had little hope of recovering any thing from him; he therefore resorted to the defendant, and demanded five per cent. more as the commissions he was entitled to on the second sale. The defendant refused to comply with this, averring that the plaintiff had already retained more than he was entitled to; viz. twelve and a half per cent. on \$11,740, when he ought to have retained only twelve and a half per cent. on \$9,000. This action was accordingly brought for the five per cent. commissions on \$9,000, to which defendant pleaded in discount \$37 7-100, already overpaid.

In conformity with the charge of the court, the jury found for the defendant, allowing him his discount.

A motion was now submitted for a new trial, on the ground that the court misdirected the jury on the law.

Mr. Justice *Huger* delivered the opinion of the court:

The contract between the parties was, that the plaintiff should sell, and for so doing, the defendant should pay twelve and a half per cent. on what was obtained for the property; the object of a vendor is not accomplished, nor the duties of the vendue master performed, until the conditions of the sale are complied with. The defendant has only received \$9,000 through the agency of the plaintiff;

he is therefore entitled, according to their contract, only to twelve and a half per cent. on \$9,000. Should he recover the difference between \$9,000 and 11,740, the first bid from Mr. L. the plaintiff may then be entitled to twelve and a half per cent. on that difference; but assuredly the defendant ought not to pay five per cent. commissions on \$9,000, because the plaintiff has procured for the property a purchaser who will not or cannot comply with the conditions. How has the defendant been benefitted by that sale? So far from deriving any benefit from it, he was very much delayed in the attainment of his object. It is true the vendue master was put to additional trouble, but this was not the fault of the defendant; when a specific sum is to be paid for the performance of a specified work, as building a house, or making a coat, the builder or tailor cannot say after the work be done, you must pay more, for it has cost me more labour than I expected. So in this case, the plaintiff was to procure for the defendant, the value of the lots in money, or the price at which they would sell at vendue, for which he agreed to receive two and a half per cent. more the plaintiff is not entitled to, and the discount was properly allowed.

The motion must therefore be dismissed.

Justices *Colcock, Gantt, Richardson* and *Johnson*, concurred.

Desaussure, for the motion.

Simons, contra.

MANNING BELCHER and WIFE *ads.* THE COMMISSIONERS OF THE ORPHAN HOUSE OF CHARLESTON.

Where parties are left free to contract or not, and do contract, they are supposed to do so in reference to the existing laws in relation to the subject matter of the contract, and the law itself becomes a part of the contract: otherwise if the act be manifestly repugnant to the constitution.

A party can by express stipulation dispense with the trial by jury. Two justices under the act of 1740, after hearing a case between master and apprentice, may discharge the apprentice.

ELIZA SMITH, an infant orphan, was bound apprentice to Mrs. *Belcher*, by the commissioners, in the mode prescribed by the act of assembly. Some time after, the commissioners conceiving that they had just cause of complaint, applied, as directed by the act of 1740, (*see 1 Brevard, 27, sec. 7,*) to two justices of the peace for Charleston district, who, after having heard the parties, directed and ordered that the said apprentice should be discharged from her apprenticeship. Mr. *Belcher* and his wife being dissatisfied with this order, made an application, as directed by the act, to one of the circuit Judges to have that order reversed, who, after having heard the case *de novo*, affirmed the order of the Justices; and a motion was now made to reverse this order, and to set aside the whole proceedings, on the ground that the mode of trial prescribed by the act, which was pursued in this case, is repugnant to the constitution of the state, and therefore void.

Mr. Justice *Johnson* delivered the opinion of the court:

The arguments in support of the motion are deduced from the 2d and 6th sections of the 9th article of the constitution, and assume the position that the appellants were entitled to the right of a trial by jury. I apprehend, however, that it is not necessary to the determination of the present question to enter into an exposition of them. It will not be denied, that when parties are left free to contract or not, and do contract, they are supposed to do so, in reference to the existing laws in relation to the subject matter of the contract, and the law itself becomes a part of the contract. Nor will it be denied that the parties can, by express stipulations, dispense with the deservedly much esteemed trial by jury, as for instance, by a reference to arbitration. Let us apply these rules to the present case. It is from the act of 1740, that the parties in

this case derived their power to contract about the matter in dispute. It points out who may be bound apprentice, and who may bind, and who take one. It prescribes the form of the indenture; and creates the tribunal resorted to in this case, and invests it with full powers to determine all matters in dispute between them. / Now, according to the rules laid down, the parties are supposed to assent to the terms which the act prescribes; and they are as much bound by it as if every article and clause had been incorporated in the indenture, and their assent expressed; and if the general rule be good, surely it applies with much greater force to cases where the parties, as in this case, derive their power to contract wholly from the law itself; and when any condition, inconsistent with, or repugnant to the law, would be wholly void. I am aware that this principle might be carried so far as to give effect to laws, contrary to, and subversive of, the constitution; but its application appears to me to be limited by marked distinctions. If, for instance, an act be manifestly repugnant to the constitution, the parties are not supposed to contract in reference to the act, but in reference to the constitution, as the paramount law. And so long as it is confined in its application to legitimate subjects of legislation, no mischief can result from it: and there can be no question that the act under consideration is of this character. Indeed, the counsel for the motion, has, with his usual candour, admitted that the motion is founded rather on the views and wishes of his client, than his own judgment.— This mode of proceeding is consecrated by a usage of eighty years.

The motion is refused.

Justices *Colcock, Nott, Richardson, Gantt* and *Huger*, concurred.

Clarke, for the motion.

Hamilton and *Petigru*, contra.



McGRATH & JONES *ads.* **A. ISAACS**, survivor of **B. H. LORTON & Co.**

A war puts an end to all executory contracts between the citizens of the belligerent nations. (a)

When the law has been solemnly settled by the court, if it were possible that a thousand verdicts could be given against the decision they would still be wrong, and the court must either adhere to its opinion or suffer the juries of the country to become the expositors of the law. As a general rule, this court will not hear a question which has not been made in the court below, but many exceptions to it have been allowed; and where the jury found three verdicts against the opinion of this court, a nonsuit was granted, though not moved for below.

TRIED before Mr. Justice *Johnson*, at Charleston, May Term, 1821.

Mr. Justice *Johnson* delivered the opinion of the court:

The court have already granted two new trials in this case, and the jury have found a third verdict against the defendants, which, according to the view taken by the court, is directly contrary to the known and established rules of law, and this is a third application to the court, in behalf of the defendants, to be relieved from this verdict. And the motion is in the first instance for a non suit, and in the event of that motion being refused, for a third new trial.

So far as relates to the facts of the case, it will be sufficient to remark, that although there was some additional evidence, and perhaps stronger, adduced on this trial, as to the moral obligation of the parties, yet, so far as they concerned their legal rights, they are precisely the same as those reported in 1 *Nott & McCord*, 563. It will therefore only be necessary to give a brief summary of those on which the opinion of the court turns, and that too only with a view to state the question with precision.—The act of Congress prohibiting an intercourse between this country and England, usually called the non-inter-

course act, was passed on the 2d December, 1809, and the restrictions imposed by it were removed by the proclamation of the President, issued under the authority of the act on the 2d of November, 1810; and on the 10th of December following, the plaintiffs, residing in Charleston, gave an order to the defendants to ship certain wares for them from Liverpool, on which the defendants consented to act. On the 2d of February, 1811, and before the wares were shipped, the non-intercourse was revived and continued in operation until the declaration of war in June, 1812. The wares were not shipped until the 17th July following, and the *Anna*, in which they were shipped, was captured by a privateer and carried into Savannah for condemnation in August or September following; so that the shipment and capture were both during a state of war between the two countries. The act of 2d January, 1813, remitting all penalties and forfeitures between 3d June and 15th September, 1812, followed, and on the defendants interposing their claim, the wares were restored to them. They appropriated them to their own use, and made a great profit on the sale. It is acceded rather on the authority of the case, than on the general doctrine, that the contract entered into by the defendants was binding on them; but on reviewing that decision, it seems to me that the decision of the court on the question arising under the statute of frauds, was rather an effort to get it out of the way, and to come at the principal question in dispute; and with this accession, the only question now to be decided is, whether the war absolved the defendants from the obligation which this contract imposed? As authority on this point, it would be wanting respect to the court not to regard the two decisions which have been already made on this very question, and in this very case, as conclusive; and I think I may safely add that there is not a *dictum* opposed to it in all the books, and the question now is, whether the court will adhere to that opinion. Great respect is certainly due to the verdict of a jury, and they will always be supported, unless they are op-

posed to some well known rule of law. When the facts are uncertain, or their interpretation doubtful, it ought to be conclusive; but in this case, the facts, out of which the question grows, are of the plaintiffs own shewing: they all depend on written documents, about the construction of which there is no dispute, and the law applicable to them has been solemnly settled by the court: and if it were possible that a thousand verdicts could be given, they would still be wrong, and the court must either adhere to its opinion or suffer the juries of the country to become the expositors of the law, and the court can have no hesitation in adopting the first of these alternatives. It becomes a question then, whether the court will send the case back for a new trial, or grant the defendants motion for a non suit?

I have before remarked, that the facts out of which this question arises, were developed by the evidence adduced on the part of the plaintiff, and the conclusion deduced from them is, that he cannot recover, and the only possible objection to granting the non suit is, that it was not moved for in the court below. As a general rule, this court will not hear a question which has not been made in the court below, but many exceptions to it have been allowed. One instance has occurred during the present term, in the case of the *State vs. Billis*, and my senior brethren inform me, that the instances in civil as well as criminal cases, have been frequent, and particularly applications for non suits, where it was evident that the whole case was before the court; as for instance, where the case depended on the construction of a written document, and if there is any case which would justify a departure from the rule, this does. It has been three times tried, and it would be doing injustice to the plaintiffs to conclude that he had kept back any fact calculated to secure his recovery, and it is seen that he cannot recover; in mercy therefore to the community, who have been harrassed with such repeated trials of this case, in mercy to the plaintiff himself, and to save him the vexation and expence

of what is likely to prove an endless and hopeless scene of litigation, I think the motion for a non suit ought to be granted, and this is the opinion of the court.

Justices *Colcock*, *Nott* and *Huger*, concurred.

Gantt, Justice :

This being a contract between two citizens of the United States, I do not think it was done away or impaired by any act of the general government. The respective rights of the parties remained to them, and with this view of the law, on the trial of the case, at first, I instructed the jury accordingly, who found for the plaintiff. But the law arising from the facts adduced in evidence having received a different interpretation from the Constitutional Court, and from the report of the presiding judge on the last trial, that the evidence is substantially the same, I can see no benefit which can result to the plaintiff by prosecuting his suit further, as it is not competent for the jury to find against what has been decided to be the established law. For which reason alone, I am induced to concur in the present judgment of the court for a non suit, and which has been often ruled under similar circumstances.

Cogdell and *Hayne*, for the motion.

Hunt and *Prioleau*, contra.

(a) 1 Nott & McCord, 570. R.



WILLIAM McELMOYLE vs. LEVY FLORENCE.

A defendant convicted of rendering a false schedule under the prison bounds act, is excluded from all benefit under that act, and the insolvent debtors act, in *any case*.

THE defendant was arrested on a bail writ at the suit of the plaintiff, and applied to Mr. Justice *Bay*, at Chambers, to be discharged under the provisions of the act of assem-

bly of 1788, usually called the prison bounds act. The plaintiff resisted this application on the ground, that the defendant was excluded from the benefit of that act, in consequence of having been previously convicted in the City Court of rendering a false schedule on an application for the benefit of this act at the suit of another plaintiff, and produced as evidence of the fact, the proceedings of the court in that case. The presiding judge was of opinion, and so decided, that he was not precluded from the benefit of the act in any case, except the particular case, in which he had been so convicted, and therefore allowed the defendant to take the benefit of his application. And a motion was now made to reverse that decision on the same ground.

Mr. Justice *Johnson* delivered the opinion of the court :

The clause of the act, out of which this question arises is in the following words : “any person who shall deliver in a false schedule of his effects, shall suffer the penalties of wilful perjury, shall be liable to be arrested again for the action or execution on which he was discharged, and forever be disabled to take any benefit from this act, and from the act for the more effectual relief of insolvent debtors,” &c. The terms are so general and comprehensive, that I cannot, by the utmost stretch of liberality, give them a construction confining the disability imposed to the particular case in which the party was convicted. It must be recollected, that the schedule is rendered on oath, and the penalties and disabilities imposed on the party who makes a false one, are doubtless intended to operate as a punishment on the offender, and furnish good reasons why the construction contended for, in opposition to the motion, ought not to prevail, even if the terms were more equivocal. The construction appears to me so palpable, that a repetition of the words of the act would constitute the best commentary. The motion is granted.

Justices *Colcock*, *Nott*, *Richardson* and *Gantt*, concurred.

Dunkin, for the motion.

White, contra,

DAVID PEMBLE *vs.* HENRY CLIFFORD.

The statute of 11 *Geo.* 2, although not binding upon us as a statute law, has been adopted in practice in this state, and as a usage, has become obligatory on us. (*a.*)

A *scire facias* on a replevin bond can not be resorted to, unless a writ *pro retorno habendo* be issued and returned *elongata*.

TRIED before Mr. Justice *Richardson*, at a special court held in Charleston, July, 1820.

The plaintiff levied a distress on the goods of his tenant *James D. Cogan* for rent in arrear. *Cogan* replevied the goods and entered into the usual bond to the sheriff with the present defendant as one of his securities or pledges. *Cogan* abandoned his action of replevin, but at what precise stage of the proceedings or at what time, was rendered uncertain, as the record was said to have been lost; and this was a *sci. fa.* on the replevin bond issued long after the abandonment of the action of replevin, but the plaintiff had never obtained or entered any judgment or instituted any other proceeding against *Cogan*, and the only question necessary to the decision of the case, was, whether the plaintiff could proceed by *sci. fa.* under these circumstances. The court below had ordered a nonsuit, and this was a motion to set it aside.

Mr. Justice *Johnson* delivered the opinion of the court:

The statute of 11 *Geo.* 2, although not binding upon us as a statute law, has been adopted in practice in this state, and as a usage, has become obligatory on us. This statute provides that the avowant in replevin may, if the condition of the bond be broken, take an assignment of it, and bring debt; and I am inclined to think, though not necessary to this case, that such an action might be supported at any time after the plaintiff in replevin abandoned his action.—The proceeding by *sci. fa.* on the replevin bond, is however fettered by other rules. It cannot be resorted to, un-

less a writ *pro retorno habendo* be issued and returned by the sheriff *elongata* or eloigned. (1 *Sellon's Prac. Tit. Replevin*, sec. 4, 13.) So far as authority is necessary, this is conclusive, and reasoning on the subject would lead to the same result. The proceeding by *sci. fa.* is not an original proceeding, and is only applicable to cases where it is necessary, as in this case, and in cases of bail generally, to make additional parties, or to carry into effect the judgment of the court, as in *sci. fa.* on judgments, and presupposes that the party is concluded by a prior proceeding: or in other words, it is a continuation of some other proceeding. Now in this case, the connection between the *sci. fa.* and the original writ of replevin, is wholly broken off by the absence of the intermediate pleadings, and their relation to, and connection with, each other, cannot be traced through the record.

The motion is dismissed.

Justices *Colcock, Nott, Richardson, Gantt & Huger*, concurred.

Cogdell, for the motion.

Clarke, contra.

(a.) *Vide City Council Charleston vs. Price.* 1 *M' Cord Rep.* 299.
R.

—————

THE STATE, AT THE RELATION OF CAPTAIN MARTINDALE OF THE CHARLESTON NECK RANGERS, vs. J. H. STEVENS AND WILLIAM EVANS, COLLECTORS OF MILITIA FINES, &c.

All Militia fines when collected, are to be paid over into the hands of the paymaster of the Regiment to which the delinquent may belong. Cases of a military nature, are very properly of Military cognizance, and ought to be submitted to, and determined by the Military tribunals only; and the Court of Common Pleas ought not to sustain any cognizance of them, unless where the Court Martials exceed their jurisdiction.

MOTION for a prohibition to restrain the defendants from paying over to the paymaster of the 16th regiment, the amount of militia fines in their hands.

In support of this motion it was contended, that all fines imposed by a company court martial, ought to be paid over and be subject to the disposal of the captain of each company, to be by him appropriated to the purposes of said company in the purchase of arms, drums, colours and other articles necessary for military purposes. And that all fines imposed by a regimental court martial, should be paid over to the commander of the corps, or regimental paymaster for the use of the regiment generally and its contingent expenses. That all offences committed by non commissioned officers and privates, were to be tried, and fines inflicted by the majority of the commissioned officers of the company to which they belonged, or in which they were enrolled ; (48 section of militia act of 1794.) That all officers from the major-generals down to ensigns, were to be tried by officers of different grades, agreeably to their rank, and the fines imposed by the different courts martial on such officers, it was admitted, ought to be paid over to the commanding officers of the different corps, or paymasters appointed to receive the same for the use of the different militia regiments. (Sections 49-50, 2 *Brevard* 54.)

These were the principal grounds relied on in the course of the argument for the prohibition. And the relator in his suggestion, states, in addition to the legal grounds urged by his counsel, that fines to a considerable amount have been inflicted upon the members of the said company of Charleston Neck Rangers, for default of duty, as well at regimental as at company parades ; and that the said fines have been collected by the present and former collector of the 16th regiment, commanded by Col. *Cross*, and are ready to be paid over to his order and agreeably to his directions, in derogation of, and contrary to his right as captain of said company, to whom the same ought by law to be paid for the use of his said company, unless restrained

by the writ of prohibition directed to the said collectors. The relator also stated in his suggestion, that the practice hitherto had prevailed for some years past, to pay over such fines to the colonel or commanding officer of the said 16th regiment, but avers that the practice is contrary to law ; therefore prays for the writ of prohibition.

In opposition, it was stated that courts martial were held on ordinary occasions for defaults on the non-commissioned officers and privates of a company, for not attending on parade duty at the usual and customary musters of the different companies of the regiment, and upon extraordinary occasions for not attending on battalion or regimental parades, pursuant to order from a superior officer for that purpose. That the colonels or commanders of regiments had not, and did not claim the fines inflicted by company courts martial for defaults of the non-commissioned officers and men at ordinary musters ; but permitted the captains to receive them for the use of their respective companies. It was contended that all fines for neglects or omissions of duty inflicted on the non-commissioned officers and privates of the different companies in the regiment by company courts martial for breaches of duty at brigade, or regimental parades in pursuance of orders from the commanders of regiments or other superior officer, should and ought to be paid over to the colonels of said regiments, or to the pay-masters appointed by them for that purpose, for the use of the regiment generally, and not to be appropriated to any one company in exclusion of all the others, and that this had been the practice ever since the militia act of 1794 passed, and since the 16th regiment was organized, a period of more than 27 years, and that this was the first time that the right or practice was ever called in question. It was further stated in opposition to the motion, that the expenses of a regiment for contingencies were very considerable for arms, accoutrements, colours, drums, music and other indispensable articles ; and that the general good of the whole ought to be considered and first attended to, rather than particular companies. That all the

expenses of the regiment were paid by the regimental pay-master out of the regimental fund arising from these fines, and had been so ever since the first establishment of the regiment, and that the 16th regiment was now considerably in debt for contingencies, which must be paid by the officers, out of their pockets, if the fines in question were diverted to other purposes, than towards payment of the regimental debts. These were the principal grounds on which the motion was opposed.

Mr. Justice *Bay* delivered the opinion of the court.

I have, since the argument, given the subject the best consideration I could, and have looked into the different militia acts, in order to find out the true intent and meaning of the Legislature in regard to the appropriation of the different fines imposed by those acts ; and after the most attentive and diligent research, I am sorry to say, that there is a great deal of obscurity and some contradiction in the different clauses respecting such appropriation. The first clause relied upon in favour of the motion, was the 45th clause of the act of 1794, which declares that “ all fines which shall be imposed in any regiment, corps, company or troop, shall be paid into the hands of the pay-master or person acting as such, of such regiment, corps, company or troop, and be paid and appropriated by warrant under the hands of a major part of the field officers, or commanding officer of the corps, or captain, or commanding officer of the company, as the case may be, for the purpose of providing colours, drums, bugles, fifes and trumpets for their respective battalions, corps, companies and troops, &c. &c.” Now according to this clause, there are three classes of pay-masters to whom these fines are to be paid.

1st. Into the hands of pay-masters of regiments.

2nd. To pay-masters of companies.

3rd. To pay-masters of troops.

It is impossible that all the fines can be paid to all three of those pay-masters ; for if they are paid into the hands of the pay-masters of regiments, they cannot be paid to

the other two classes of pay-masters of companies and troops ; and so in like manner, if they are paid into the hands of either of the other two pay-masters, nothing can be paid to the regimental pay-master, the companies will get the whole. Hence, the evident obscurity and apparent contradiction in the clause itself, in making the same thing payable to three distinct classes of men for the same purposes. And this appears to me to have given rise to the ingenious construction given by the counsel in the argument in favor of this motion, in order to give some kind of consistency to the clause in question, viz : That all fines inflicted by company courts martial for all defaults or neglects committed by the non-commissioned officers and privates of every description, should be paid over to the pay-masters of the companies or troops in which they were committed ; and all fines inflicted on commissioned officers of every grade, should be paid into the hands of the regimental pay-masters for the use of the regiments ; thus making an evident distinction between the fines arising from the default and neglect of the commissioned officers of the regiment, and those arising from the defaults and neglects of the non-commissioned officers and privates, which, no doubt, would make a prodigious difference in the aggregate amount in the course of a year. The clause, however, in the act, is perfectly silent as to this separation and division of fines inflicted by regimental and company courts martial. It does not say that there shall be any distinction between the fines inflicted by regimental and company courts martial, that one class of fines shall be paid over to a regimental pay-master, and another class paid over to the pay-masters of companies or troops (which includes those of every kind or degree) in any regiment, company, corps or troop, shall, in the first place, be paid over to the pay-master of the regiment, and then to the pay-masters of the companies and troops, as the case may be, &c. &c. There is no separation or division in the act ; the whole or none must be paid to one or other of the pay-masters mentioned in the clause. Now, the great ques-

tion in this case is, to which of them are these fines to be paid? And I candidly confess, that I find great difficulty in giving a direct and positive answer to the question. If I were a Legislator, and was asked the question, to which of them ought these funds to be paid over, I should not hesitate a moment in saying, that the good and prosperity of the whole corps or regiment ought to be preferred to the aggrandizement of any one company before or over another, but that the whole ought to be put upon the same footing to make one efficient complete corps or regiment; and that all the funds in the regiment ought to be appropriated to that general purpose. My judicial functions, however, preclude me from giving any such answer to a question of a legislative nature in the present instance, and I find myself greatly relieved from the embarrassment under which I laboured in answering the above question, by resorting, in the present instance, to military usage as the best solution and exposition I can give to the point now before me; for it came out in the argument against the motion, that it had been the usage and practice ever since the year 1794, when the act passed and the 16th regiment was organized, to pay over these fines into the hands of the regimental pay-master only, for the use of the said regiment, and this was admitted to be a fact by the counsel for this motion. Here then is a military usage for 27 years, a period more than long enough to establish a prescriptive right, and give to a custom, the force of law, for 20 years will establish a prescriptive right: and this construction was given by military officers, who ought to be the best judges of military law, soon after the act passed and came into operation; and it has uniformly been acquiesced in throughout the state of South-Carolina to the present day; and this is the first time it ever was called in question. In looking further into the militia laws of the state, I find that this construction, given by the officers of the regiment soon after its organization, was sanctioned by Legislative authority in the year 1813, nineteen years after the act of 1794 had gone into operation. For it is

expressly declared in the 11th clause of the act of 1813, amending the militia laws of the state, "that all fines collected as above, shall be paid into the hands of the pay-master of the regiment to which the delinquents shall respectively belong." There is no doubt or obscurity in this clause, which was an amendment of all former militia acts then in force, and it is the last law upon the subject. This act, therefore, in my opinion, ought to have a governing influence over all the regiments in the state, as it removes all the doubts and obscurities respecting fines, in all the previous acts, and is in exact conformity to the military usage above mentioned. I am therefore of opinion, after a full consideration of this case, that the motion for the prohibition should be rejected, and that the collector of the fines should pay the amount into the hands of the pay-master of the 16th regiment, for the use of the same. The Judges, after the report of the foregoing case, were unanimously of opinion there were no grounds for the prohibition, and that the motion was very properly discharged. They were further of opinion that these kinds of cases of a military nature were very properly of military cognizance, and ought like all others of the like nature to be submitted to, and determined by, the military tribunals only, and that the Court of Common Pleas ought not to sustain any cognizance of them, unless in cases where the courts martial step out of their jurisdiction and take cognizance of cases which are not within the meaning and purview of our militia acts.

Justices *Colcock, Nott, Huger, Gantt, Richardson* and *Johnson*, concurred.

De Saussure, for the motion.

Petigru, contra. .

• RICHARD S. YOUNGBLOOD vs. CHARLES LOWRY, *et. al.*

A horse sent to a livery stable, to be fed and taken care of, is not liable to be distrained for rent.

Mr. Justice *Bay* delivered the opinion of the court.

THE point submitted to me by the pleadings in this case is, whether a horse sent to a public livery stable, to be fed and taken care of, is liable to distress for rent in arrear, due from a tenant to his landlord?

Formerly all goods and chattels of every kind, found upon the premises, were liable to be distrained for rent in arrear, whether in fact they belonged to the tenant or a stranger. This authority, allowed by law to a landlord to be his own avenger, or of administering redress to himself, is the relict of the old feudal system, and became extremely oppressive to the community at large, as no man's property was safe from the all-grasping power of landholders. The property of strangers travelling through a country, calling for hospitality, or neighbours visiting, or holding a friendly intercourse with each other, or their cattle straying, or accidentally found on the premises in possession of another, were all liable to be distrained for rent, although they had never made any contract with the owner of the soil, or even knew that any rent was due from the tenant for the use of the lands he occupied. By means whereof, one man's property was taken away from him forcibly, and without his consent, to pay the debt of a third person, to whom he was never under any obligation, which is clearly inconsistent with every idea of justice, and that security of property which every citizen ought to enjoy in a free country. I am very much disposed to think that this whole system of distress for rent was unapplicable to the circumstances originally of the British colonies, where the ancient feudal system was utterly unknown, and nothing but colonial dependence could ever have permitted it to gain a footing in America in subservience to British policy; accordingly some of the

colonies, particularly Connecticut, (and I am informed Rhode Island) never permitted this law of distress for rent to be introduced; (*2 Swift*, 89, [*a.*]) Every thing in that state depends upon contract, by which alone a man ought to be made liable for debt, and his goods subjected to seizure and sale. And it may one day, and that perhaps not a very distant day, become a question well worthy of the attention of the Legislature of this state, whether they will not abolish it in South-Carolina, and place the contract for rent on the same footing with all other contracts between men; in which one man, whatever his landed estate may be, will not be permitted to take the law into his own hands, and be his own minister of justice, by taking the property of an innocent man for the debt due from his tenant, although found upon the premises demised.

In England, it is true, that in process of time, the rigour of this ancient policy of the feudal right in this instance, has been released, and a variety of exceptions were made from this law of distress, and exemptions established from this unjust and unreasonable power of landlords; as a horse standing in a smith's shop to be shod, or in a stable of a common inn, or cloth at a tailor's house, or corn sent to a mill or to market, which are all supposed in common presumption, not to belong to the tenant or occupier of the house; and many other things of the like nature. And so, if a man ride a horse to the house of another, and is there taken sick, which occasions him to tarry a few days, his horse cannot be distrained by a landlord; so also, if a clothier carries wool to spin, neither the horse nor the yarn is liable to distress. All these, and many exemptions have been made from necessity and public utility to the community, as also for the benefit of trade and commerce, which are to be found in the books. But it is said that a public livery stable does not form one of these exceptions. To this, I answer, if things are privileged from distress on the score of necessity, utility and public convenience, as above enumerated, it appears to me that

livery stables, are of as great public convenience and utility as public inns, and come equally within the sound policy and reason of the law, and therefore ought to be placed upon the same footing as public inns, and although of more recent establishment than public inns, are yet like new trades; they are under the same protection as old ones of the same kind. The true foundation of all the exemptions from this rigorous law of distress, is the detriment, the common-weal would suffer, if such things should be liable to distress under all such pressing circumstances. It is almost unnecessary to add, that the circumstances and situation of Carolina, call loudly for such an exemption; for it is well known, and notorious, that almost the whole of the citizens of the state, are obliged occasionally to resort from the country to this great, and only mart and sea port to transact their commercial concerns and other business, essentially necessary to their interests; and that numerous strangers and travellers are constantly passing and repassing through Charleston, to and from other parts of the union, so that the public inns could not accommodate the one twentieth part of them. Hence the absolute necessity for these public establishments for the care of horses and carriages, while our citizens and strangers are comfortably lodged and accommodated at private lodgings and boarding houses, during their stay in the city. To expose, therefore, such a mass of valuable property to the grasp of insatiable landlords, would ruin and destroy those valuable establishments of livery stables in every part of the town, or render them so dangerous and uncertain, that no prudent man would make himself liable to such a hazard. The public inconvenience, therefore, would be beyond all calculation. I am aware of the case of *Frances & Wyatt*, (3 *Burr.* 1504,) where all the law for and against this exemption is brought forward, and even in that case, it was a matter of so much doubt among the judges, that after two learned arguments, they ordered a third. In 1 *Blacks. Rep.* 485, it is however said, that judgment was afterwards given for the defendant upon the ground of

its being part of the premises demised, which distinguishes it from the case of goods sent to be manufactured, and the other exceptions out of the rule ; so that in fact, the whole ground seems to have been changed by the nature of the judgment. But that case is very distinguishable from the one under consideration. That was a case where a coach had been placed in a house hired from a livery stable keeper, and the owner of the coach might have been considered as an under-tenant, and therefore his goods according to the law of distress, became liable for the rent, and on that account *Lord Mansfield* said, judgment was given, as it was part of the profits of the premises, i. e. the rent for the use of it. The present case, however, is one where a traveller or a gentleman from the country, sent his horse to be fed and taken care of at a public livery stable, as at a common inn, during his stay in town, and therefore, in my opinion cannot be likened to the case of a man hiring the use of a coach house ; for which reason, according to the best of my judgment, it ought to be placed upon the same footing, exactly, as a common inn, as they both come within the same reason of the law. If any former case had ever been determined in this state upon the subject, I should have found myself bound by it ; but as no such case has ever been adjudged within my knowledge, I think myself at liberty to make such a decision as will best answer the ends of justice at this day in South-Carolina, and best suit the situation and circumstances of the country in point of utility and public convenience. Upon the whole, therefore, my opinion is, that judgment should be entered for the plaintiff in demurrer.

Justices *Colcock, Nott, Huger, Johnson, Gantt*, and *Richardson*, concurred.

King, for the motion.

Grimke, contra.

(a.) In N. Jersey, no goods and chattles found on the premises are liable for rent, but such as belong to the tenant.—(*Griffith's U. S. Law*

Register, title *N. Jersey*, p. 1305, 1306.) So in Virginia, do. do. 364. In Ohio. there is no law to distrain for rent; but see as to all the different states, the above very useful and praiseworthy work of Judge *Griffith*. It is published in numbers, at Burlington, N. Jersey, and should be in the office of all such gentlemen as are disposed to have a succinct and correct view of the systems of law and jurisprudence in the several states. R.

THOMAS TOLMAN vs. JAMES THOMPSON.

The City Court of Charleston has no jurisdiction of cases in attachment.

MOTION to reverse an order of the City Recorder, in a case under the attachment law. January Term, 1822.

This case was briefly as follows:—"An application was made to the Clerk of the City Court of Charleston, to sign a writ of attachment against the defendant, who, it was alledged, was out of the state, and a bond was offered in the usual form. But he refused to issue it, on the ground that the City Court had no jurisdiction under the attachment law of the state. Upon this refusal of the clerk, a rule was obtained against him to shew cause before the Recorder, why he refused to sign the writ; and on the return of the rule, he shewed for cause, "that the City Court of Charleston had no power or cognizance of cases by attachment," which was sustained by the Recorder as good cause; and the rule was discharged against the clerk accordingly. This was therefore a motion to set aside the decision of the Recorder as against law.

The ground taken by Mr. *Clarke*, the counsel, in support of the motion, was, "that the act of 1818, enlarging the power of the City Court in civil cases, gave that court jurisdiction of all incidental powers and authorities to carry the attachment act into complete execution; and relied upon 4 *Dall.* 11, where the jurisdiction of the United States was determined to have cognizance of cases, where

the defendants were out of the United States, though not given by act of Congress ; also, upon the custom of London, in favour of the attachment.

Mr. *Grimke* against the motion, contended that the process by attachment was unknown to the common law ; it was a part of the civil law : that the custom of London was local in its nature, and never could be construed to extend further than that city, in favour of its commerce. It never was a part of the common law of the kingdom of Great-Britain, in general, and consequently it never was extended to South-Carolina as a part of the common law intended for this country, when the common law was declared to be of force here. That being the case therefore, every thing under the attachment system in this country depended upon the terms of our local act only, ' passed in the year 1744.

Mr. Justice *Bay* delivered the opinion of the court :

I have considered this case, and am fully of opinion that there are no grounds for reversing or setting aside the opinion of the Recorder in the City Court. The act of 1801 ascertains and establishes the jurisdiction of the Inferior Court of Charleston.

1st. Against all offences against the by-laws of the city, " and on all contracts expressed or implied to the amount of one hundred dollars, with a *proviso*, that the jurisdiction shall extend only to persons resident within the limits of the city, and those who have been in it for 4 months," &c. From this act it is evident to my mind that no further jurisdiction was intended to be given to the City Court of Charleston, and those residing within it for the space of 4 months, than the recovery of money on contracts, express or implied, and on contracts arising within the city, or between foreigners within the same. The act of 1818, enlarging the jurisdiction of the City Court, declares that it shall have concurrent jurisdiction with the Court of General Sessions and Common Pleas, in all cases of misdemeanour, assault and battery, arising within the

city ; also, all cases of trover, detinue, replevin and trespass, and in civil cases, to the amount of \$ 500. This latter act therefore only adds to the jurisdiction of the City Court, cases of misdemeanour, assault and battery, and cases of trover, detinue and replevin, and in other civil cases, to the amount of \$ 500. Not one word is said about the proceeding by the process of attachment in either of these acts. But it has been argued that the attachment, being in nature of a civil case, it is implied in the general powers given to the City Court, and ought to be presumed to have been given to the City Court. To this I answer, that it is a well known rule of law, that when a new jurisdiction is created by act of parliament, nothing shall be presumed to be included within it, but what is specially given ; all presumed powers are absolutely excluded, unless it be those which are naturally attached to, and are necessarily connected with, the special powers given, and without which, those powers could not be carried into execution. From which it appears to me, as the attachment act and its various proceedings were never given by any of the above acts, or annexed to the jurisdiction of the City Court, it never had any cognizance of it, or of any of its clauses. Besides, it must be recollected that the proceeding by attachment was never authorized by the common law. It was of civil law origin ; and although it was allowed by the custom of London in favor of commerce, yet that was a local custom, and not the general law of the realm. And when the common law was extended to this country, the proceeding by attachment formed no part of it. Every thing therefore under this system depends upon the local act of South-Carolina, called the attachment act ; the law in question, and not upon the common law, or the custom of London. Now, from a review of this act, and its different clauses, it will appear abundantly evident, it never was calculated for, or intended to be carried into execution by an Inferior Court, or one of a limited jurisdiction. The preamble relates the inconveniencies and injuries arising from a defect of the recovery of debts

due from persons who are absent beyond seas, or who withdraw themselves out of the limits of the then province, leaving debts, goods and chattels behind them," &c. The first clause then authorizes persons having lawful demands against such absentees, &c. to petition the Chief Justice or any one of the Judges of the Court of Common Pleas for a writ of attachment against the goods and effects of such absentees, who shall have power to order the same; to the provost marshal who shall have power to attach the same, and to make a return to that court, who is empowered to make all the necessary orders in every stage of the proceeding. It would be a waste of time to go minutely through all the different clauses of the act.— Suffice it to say, that all the powers in the act, and all the orders and proceedings under it are given to the Court of Common Pleas, and the different Judges in that court, and to them alone: from whence I infer that that court, and that court alone, has sole jurisdiction of all cases under the attachment act. I do not presume to say that the Legislature could not give jurisdiction or power to an Inferior court to exercise all the requisite authorities to carry it into complete execution. Accordingly, it will be found when County Courts were established in this state, and inferior jurisdictions were created, a great variety of clauses in that act gave jurisdiction over the attachment law, and directed the mode of proceedings under it. And so in like manner the Legislature might have given a similar jurisdiction to the City Court of Charleston. Perhaps at some future day that may be given, however difficult it may be to modify it conformably to the principles of the present act. But as the law now stands, I am clearly and decidedly of opinion, the City Court possesses no powers to carry that act into execution, and that the decision of the Recorder was perfectly correct and legal in the present case; and this I am authorized to say is the unanimous opinion of the court.

Justices *Colcock, Nott, Richardson* and *Gantt*, concurred.

Clarke, for the motion.

Grimke, contra.

Johnson, Justice, was absent holding the Circuit Court when this case was argued in May last, and therefore gave no opinion.

JOSEPH CLARKE *ads.* THE STATE.

Employing a boat between Charleston and Sullivan's Island, does not constitute the person a ferryman within the meaning of the exemptions at common law, or the militia act, from militia duty.

A person so running a boat, has not the exclusive rights of a ferryman, nor is he liable to the same restrictions.

THIS was an application brought before Judge *Bay*, at Chambers, for a prohibition to restrain the officer from levying a militia fine.

Mr. Justice *Bay* delivered the opinion of the court :

The first ground of this application was, that the applicant was the owner of a boat which plied between Charleston and Sullivan's Island, which constituted him a ferryman.

2nd. That he had a license as the master of a coasting vessel, and was sometimes employed in that service.

With respect to *Clarke's* first ground, I was of opinion, that employing a boat between this City and Sullivan's Island, did not constitute him a ferryman within the meaning of the exemption at common law, or the militia act, as there were at least twenty persons who employed boats of different kinds between Charleston and Sullivan's Island ;

all of whom had equal rights, and that twenty more might employ boats in the same business if they thought proper. There was nothing exclusive, or which was confined to a single individual in that kind of intercourse; it was equally open to all. Whereas, a ferryman in the understanding of the common law, and also of the militia act, was one who had the exclusive right of transporting passengers over rivers or other water courses for hire, at an established rate: And no other person could keep or employ a boat to his prejudice either at the same place, or within a limited distance, above or below him: And he was bound, at all times, to be ready with good boats and craft to convey passengers backwards and forwards, otherwise an action would lay against him. In the present case, however, Mr. *Clarke* was under no such obligation. It was merely optional in him to go and carry what and when he pleased. He could not, therefore, be considered in law as a ferryman, only as the owner of a boat who was employed occasionally, (when he pleased,) in carrying passengers and their baggage to and from Sullivan's Island. And with regard to his being a sea-faring man, it was alleged that he had got a license from the custom house for commanding a coaster; but when, and at what time, did not appear. Nor did it appear that he was employed in that business at the time he was summoned to do duty as a militia man. And the exemption by the militia law extends only to those who are actually employed in the sea-faring business at the time of summons.

Justices *Colcock*, *Gantt*, *Johnson* and *Richardson*, concurred.

Crafts, for the motion.

Kennedy, contra.

JOHN PORTEOUS *ads.* CHARLES GIVENS & WIFE.

Where a verdict in debt was for damages beyond the amount of damages laid in the writ, the court ordered *a venire de novo*, unless a *remittitur* was entered for the surplus.

But after such order of the Appeal Court, and before final judgment is entered, a judge may, at Chambers, grant leave to the plaintiff to amend his record by increasing his damages from \$10 to \$1000.

Formerly it seems, when the record was once made up, no amendment could be permitted; but now the courts have become more liberal, and when justice requires it, will allow of amendments at any time while the suit is depending, till judgment be given.

CHARLESTON Court of Appeals, January, 1822.—
Motion to rescind the order of a Judge at Chambers to amend proceedings, &c.

This was an action of debt on a judgment against the defendant as an administrator. The defendant did not plead *plene administravit* or *plene administravit præter*, and judgment was entered up against him for \$1980, 5 cents, and a *fi. fa.* was taken out against him on that judgment, and returned *nulla bona*; upon which the plaintiff brought debt on the judgment, suggesting a *devastavit*; but in the writ laid no damages, and in the declaration, laid only ten dollars damages. The jury in this action on the judgment found the amount of the original judgment \$1980, 5 cents, with interest from the 10th May, 1819, which greatly exceeded the damages laid in the declaration. On an appeal to the Constitutional Court in May term last, that court granted a new trial, unless the plaintiff would release the excess of damages. (1 *McCord's Rep.* 379.) This they refused to do, but applied to Judge Bay, at Chambers, for leave to amend the declaration, by increasing the damages from ten, to one thousand, dollars. The order was accordingly made, and a rule was taken out at last October term, to shew cause why the said order should not be set aside, which rule was discharged; and an appeal was now made from the decision of the Circuit Court below, why the same should not be set aside on the following grounds, viz:

1st. That no damages were laid in the writ.

2d. Because there was nothing to amend by.

3dly. If the proceedings were amendable, a Judge at Chambers had no power to order the same in vacation.

Mr. Justice *Bay* delivered the opinion of the court:

I have considered these points as well as the arguments of counsel on both sides, and with regard to the 1st ground, I am of opinion it is now too late to take that exception, as it might have been taken advantage of in pleading; either by pleading in abatement to the writ, or by motion to the court to quash the same for informality. But as the defendants took no such exceptions, and suffered judgment to go against them by default, and final judgment to be entered for \$1980, 5 cents, they are now precluded from that advantage; for the law is clear that even on a writ of error a man shall not be permitted to assign for error that which he might have pleaded in abatement. *Carth.* 124, 1 *Bac. Abr.* 19, same doctrine is laid down. In 2 Lord *Raym'd.* 853, in a case upon a *sci. fa.* upon a judgment, it was laid down by the whole court, that where a matter which was pleadable in the original action is not taken advantage of by pleading, he shall not avail himself of it upon a *sci. fa.*; for the plaintiff being admitted to be able to recover judgment, he cannot be disabled from having his execution upon it, by matter precedent to the judgment, 2 Lord *Raym'd.* 852, which appears to me to be directly in point upon the present case. So in like manner, if a feme covert bring an action in her own name, *per attornatum*, and defendant plead in bar to the action, he shall never afterwards assign coverture for error; from all which I infer it is too late to take advantage of that defect.

As to the second ground, "that there was nothing to amend by," I am of opinion that there was matter of record to amend the subsequent proceedings by; for judgment had been entered up in the former action for \$1980, 5 cents, which remained unsatisfied; so that when the action was brought upon this judgment, it must have been a mere mistake of the attorney or person who filled up the writ, not to have inserted damages enough to have covered the debt and damages: besides, there was an action of debt on record, for a sum *in numero*, where the damages

were merely nominal, unless by way of increase for the detention of the debt with the costs ; and therefore it does not appear to me to be so essential to the justice of this case, as in an action sounding altogether in damages. But admitting it to be requisite, as appears by the order of the Constitutional Court in may last, I am of opinion it is still amendable in favour of the right and justice of the case.— This doctrine of amendments has latterly liberalized the proceedings of our courts exceedingly. In order to come at the real merits and justice of every case, “ formerly, as Mr. *Blackstone* says, in 3d vol. 407, the suitors were much perplexed by writs of error, brought upon very slight and trivial grounds, as misspellings and other mistakes of clerks and the like, which might be amended at common law, while the proceedings were in paper. But when the record was once made up, it was formerly held that no amendment could be permitted ; but now the courts have become more liberal, and where justice requires it, will allow of amendments at any time, while the suit is depending, ’till judgment is given. And it is to be recollected, that the suit upon the judgment in this case is still depending, no final judgment has yet been entered upon it ; so that even at common law it is amendable.— This author pursuing the same subject, 3 *Blk.* 407, goes on and says, “ but when judgment is once given and enrolled, no amendment was admitted at any subsequent term by the common law. By the statutes of Jeofails, however, amendments are allowed to be made whenever any slip or oversight is discovered in the proceedings at any stage. These statutes are, as Mr. *Blackstone* says, many in number, (and they are of force in this country,) and are too minute to be taken notice of further than by referring to them ; by which all trifling exceptions are guarded against and corrected, and the proceedings are allowed to be amended agreeably to the very right of the matter. These statutes are no less than twelve in number, and by them, seconded by the Judges of a more liberal cast, Mr. *Blackstone* says, page 411, that all this un-

seemly degree of strickness has been eradicated. And in 2 *Crompt.* 437, it is said, that after verdict no judgment shall be stayed or reversed for any defect or fault in form or substance in any bill, writ original or judicial, for any variance in such writ, from the declaration or other proceedings. In 1 *Will.* 7, an amendment was allowed to be made to a declaration, by inserting £8,000 instead of £800. From all these authorities, and the reasoning upon the subject, I am of opinion that there was matter sufficient to amend by, and that the plaintiff was well entitled to his amendment.

As to the third and last ground, "that the order cannot be made out of court, in chambers," I must observe, that it should be recollected our courts are so much pressed for time, that one fourth part of the business can never be done in term time. Hence, a great mass of business is usually left unfinished at the end of every term; not only the trial of issues, but a large proportion of that kind of business which is preparatory for trial, and unavoidably necessary to put a final end to the causes of suitors left unfinished at the end of each term, and which has been partially transacted during the term. Hence, the necessity of the Judges giving their aid in vacation to all that class of cases of every kind, which the pressing necessity of justice may require at chambers; and a variety of cases all go to shew that this has long been the practice of the Judges in England. In 2 *Burr.* 781, it appears that Mr. Justice *Dennison*, in vacation, made an order "that a defendant should, within a given time, plead such a plea as he should stand by," &c.; and it was objected to, as an order which ought not to have been made by a Judge at chambers; but all the court agreed in justifying the order made by Mr. Justice *Dennison*, not only as being rightly made upon the circumstances of the case, but also as being such a one as might properly be made at chambers. In the celebrated case of the *King* against *Wilkes*, where all the doctrine upon this point is most fully and ably argued; where Lord *Mansfield* ordered the infor-

mation to be amended at chambers, by striking out the word "purport" and inserting the word "tenor," it was observed, in the argument of the case, that that was a criminal proceeding ; but Lord *Mansfield* says, in 4 *Bur.* 2567, that there never was any distinction between criminal and civil cases. His Lordship then goes on and says, that as to the amendment at chambers, it is most certainly the practice—" *non constat*," when it begun, but it seems to have been since out of mind, and the business of the court could not be done without it. It is the most irksome business of a Judge, but it is greatly for the benefit of the subject, and tends to the advancement of justice. It arises from the overflowing of the business of the court, which cannot all be done in court, or in term time. Mr. Justice *Aston* concurred with Lord *Mansfield* ; he says, as to making the order at chambers, the practice of the court has always been so ; the business done is become an immense load upon the Judges, and is extremely troublesome ; but it is the practice, the custom of the court, and therefore part of the law of the land. Mr. Justice *Willes* concurred with the other Judges. This authority I considered as the highest in the books upon this last point. It is relied upon by *Tidd.* 652, 655 ; by *Taunton*, 44 ; and an order at chambers, made in the progress of a cause in *Carpenter vs. Coleman*, in our own court, was affirmed in the Constitutional Court at Columbia, (2 *Bay*, 436.) From the best view therefore which I can take of this case, I am of opinion that there are no legal grounds to reverse or set aside the order in chambers ; consequently, that the rule for the motion should be discharged.

Justices *Nott*, *Huger*, *Gantt*, *Richardson*, and *Johnson*, concurred.

Hayne, Atty. Gen. for the motion.
Grimke, contra.

Mrs. HARRIET B. CRAFTS vs. The Ex'ors of WILLIAM CRAFTS, deceased.

A wife is not entitled to dower of land bought by the husband, and by him mortgaged to the vendor for the purchase money.

THIS was an application on the part of Mrs. *Crafts* for her dower in certain wharves in Charleston. It was admitted that Mr. *Crafts* had been seized of the wharves in question during his intermarriage with the demandant ; but that they had been mortgaged, and that the time of redemption was past previous to the marriage. It also appeared, that one of the creditors, to whom a mortgage had been given, was the person of whom Mr. *Crafts* had purchased the property, and that it was immediately re-conveyed by way of mortgage for the purpose of securing the purchase money : that it was mortgaged to other creditors to secure other debts to a greater amount than the value of the property. The act of 1791, (1 *Faust*, 65,) declares, “ that no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage is elapsed, but the mortgagor shall still be deemed owner of the land, and the mortgagee as owner of the money lent or due ; and shall be entitled to recover satisfaction for the same out of the land in the manner set forth in the preceding clause of the act. On the part of the demandant, it was contended, that as the act declared that the right of the land should still continue in the mortgagor, Mr. *Crafts* was seized in fee during the marriage and at the time of his death, and therefore his widow was entitled to dower. The question was submitted to Mr. Justice *Bay*, who presided in Charleston, January term, 1821. Being of opinion that the widow was not entitled to recover, he dismissed her petition. This was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court:

I do not think it necessary to follow the counsel over all the grounds which they have endeavoured to lead us in pursuit of the common law doctrine on this subject.— It is admitted that at the time these mortgages were given, the whole interest in the property, whether absolute or contingent, belonged to Mr. *Crafts*. That interest he vested in his creditors (the mortgagees) subject to redemption only by the payment of the money. It was not then in his power by any contract which he could make, or any act which he could do, not even by the contract of marriage as highly as it is respected in law, to impair the obligation of the contract which he had previously made, nor lessen the security which he had before given; and although the right still remained in him, it was subject to the incumbrance which he had created. The wife must take her dower as she takes her husband *cum onere*. She may come in and redeem the property, and then, and not till then, is she entitled to her dower.

The motion therefore must be refused.

Justices *Colcock*, *Gantt* and *Huger*, concurred.

Johnson, Justice, dissented.

Lance, for the motion.

Toomer & Hayne, contra.

THE STATE vs. S. & M. ALLEN.

The act authorizing the tax collector to issue executions against persons who shall make default in returning their taxable property and paying their taxes is not unconstitutional.

The act of 1820, which imposes a penalty of ten thousand dollars on any person who shall sell any lottery tickets within this state, or shall keep any office for that purpose, so far as it goes to authorize the tax,

collector to issue an execution for the same, without a conviction by a jury is unconstitutional and void, although, by the act, it is called a tax and not a penalty.

THIS was an application to the Court of Sessions, in Charleston, Spring Term, 1821, for a prohibition to restrain the tax-collector of that district from enforcing an execution which he had issued against S. & M. Allen, for the sum of ten thousand dollars, being a tax imposed by the last clause of the appropriation act of 1820, which is in the following words: "That a tax of ten thousand dollars, be, and the same is hereby imposed upon every person or persons, who shall after the passing of this act open or keep open, any office for the sale of any lottery tickets, or who shall sell within this state any lottery tickets, in any other lotteries than those which are authorized by the laws of this state. And it shall be the duty of the tax-collectors in the district where such lottery offices are opened, in default of the person or persons keeping such offices, to return the same, and pay the tax imposed by this law, to issue his execution as in other cases of defaulters."

Some short time after the passage of this act, the office in question, was opened for the purpose of selling lottery tickets. The proprietors having refused to pay the tax, this execution was issued. Application was then made to the court in Charleston, for a prohibition, which was refused by the then presiding Judge; and this was a motion to reverse that decision, and for an order that a prohibition should be issued.

Mr. Justice *Nott* delivered the opinion of the court:

In support of this motion, the two following grounds are taken.

1st. That the tax was not due at the time the execution was issued.

2nd. That the act subjecting a person to an execution without any legal trial and judgment, is unconstitutional and void.

In determining the first question, it is not pretended

that this court can set limits to the discretion which the Legislature may exercise in selecting the subjects of taxation. Neither is it denied that they have the power to fix the time when the tax shall become due, and to prescribe the mode by which it shall be collected. We are merely to give construction to the law, to declare what the Legislature have done, and not what they can, or may do. It is admitted that this is an annual tax: It is therefore necessary to fix a period when it shall commence. If the act had fixed a time when this particular tax should be paid, there would have been an end to the question. But as there is no particular time mentioned, we must look to the general provisions of the law in relation to other subjects of taxation, for the construction with regard to this. And as far as we are able to trace the acts of the Legislature back, it appears that the first day of October has always been the period to which the assessments have been made to relate. The quantity of land and the number of negroes owned, the amount of money at interest on that day, and the amount of professional income received during the year terminating at that period, have always constituted the basis of taxation. To this rule, there have been at most, but two exceptions; one is the tax upon stock in trade, the amount of which is, by an express provision of the act, to be estimated on the first day of January; the other, the tax upon Theatrical exhibitions, shows, &c. which by a similar provision becomes due whenever it shall be demanded by the clerk of the court, and which, from the nature of the tax itself, must have been an exception, because it is to be paid per diem, and not per annum. Whenever a new subject of taxation is introduced, it must be governed by the general provisions of the law of which it is a part, and not by the exceptions; unless the nature of the tax should lead to a different conclusion. Indeed, this is the only practical construction which can be given of the law. For the tax-collector is required to complete his collections and settle his accounts by the first of May; after which, according to his construction, a

person may erect as many lottery offices, and sell as many tickets as he pleases with impunity. In answer to this, however, it is said that the tax-collector might proceed at any time when an office should be opened, to collect the money, and to issue an execution for that purpose, whenever the tax is withheld, in the same manner as is directed in the clause, relative to plays, shows, &c. But the act gives the tax-collector no such authority as is given to the clerk in the clause alluded to. When he has closed his accounts, there is an end of his authority for that year.— It is also further contended, that unless he may demand the tax whenever the office is opened, it may be altogether evaded, because it might not be open on the first day of October ; but I do not know that it would be necessary that the office should be open on that day to render the proprietor liable to the tax. Professional income is not received on the first day of October, yet the person is liable to be taxed for the amount of income received during the preceding year. But suppose that by this construction the tax be eluded, it is no more than may be done with respect to almost every other tax. Suppose a person should purchase land and negroes on the second day of October, and sell them on the last day of September following ; or should lend money and receive it back in the same manner ; it will be seen that he would receive the annual profits of his lands, the labour of his negroes, and the interest of his money, and yet evade the tax ; but that results from the terms of the law itself, and not the administration of it. The assessment of this tax could not have had relation to the October preceding.

1st. Because the language of the act is prospective ; and

2ndly. Because the office was opened after the passage of the law. I am therefore of opinion that the tax was not due, and that the execution was prematurely issued. This view of the subject, so far as regards this case, dispenses with the necessity of giving any opinion on the other ground. But as the tax-collector may feel authorized to proceed to collect the tax at the end of the year, un-

less an opinion is given on the other ground, the court has thought it best to decide the whole case.

The second ground presents the two following questions for our consideration :—

1. Whether supposing this to be a tax as it is called by the act, the collector can enforce the payment of it in this summary manner, or whether the fact on which the Relator's liability is predicated, must first be established by the verdict of a jury.

2. Whether it must not be considered rather in the nature of a penalty than a tax; in which case, it is still more confidently contended, that the part of the act authorizing the tax-collector to issue an execution without a trial by jury, is unconstitutional and void. The clause of the constitution under which the Relators claim this privilege, is in the following words :—“ No freeman of this state shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.” In order to a correct decision of the first question, it is only necessary to settle the meaning of the words in the constitution, “ the law of the land.” And on that subject, little more need be said than to refer to the commentaries on Magna Charta, from whence they have been copied. Dr. *Sullivan*, in his lectures, after commenting upon various parts of Magna Charta, says, “ let us next consider the end of this part, which is an exception running through the whole ; *nisi per legale iudicium parium suorum vel per legem terræ*. Now the *lex terræ*, the common law, in the universal practice of it, allows these exceptions, &c.” And in page 493 and 494, he enumerates several cases where the courts of law may proceed to give judgment *per legem terræ*, without the intervention of a jury. As in all cases, where a person makes default or confesses judgment ; all cases of demurrer and special verdicts ; cases of contempt, &c. ; and concludes with the words of Lord *Coke*, “ the due process

of the law is *lex terræ*." See also the case of *Zylstra vs. the Corporation of Charleston*, 1 Bay, 390. To these may be added, the confinement of persons for safe custody, who are accused of high crimes and misdemeanors; all cases in the Courts of Equity, and in the Courts Military, Maritime and Ecclesiastical, the proceedings of which are carried on without the intervention of a jury.—Distress for rent also is another case within the exception; and last, though not less satisfactorily established, distress for taxes. All these and many others which might be mentioned, are carried on by the well known and established principles of common law or *lex terræ*, without the aid of a jury. This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence; it has been continued by all the states since their independence, and had existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation. I do not consider it as deriving any support from that provision in the constitution, that all laws then in force should continue so, until altered or repealed. I cannot believe that the authors of that instrument intended to give effect to laws, the provisions of which were in direct hostility to the constitution itself. That clause was introduced, I presume, through abundance of caution, to remove any doubt which otherwise might have been entertained, whether all pre-existing laws might not have been prostrated by the abolition of the old constitution. I think therefore that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury, and is embraced in the alternative, "the law of the land." Such I consider to be the summary proceeding allowed in the collection of taxes; and I should think the proceeding in this case authorized by the law of the land, if I could consider the

sum required to be paid as a *tax*. The second question presents the case in a very different shape. The sum of ten thousand dollars is imposed upon every person who shall "open or keep open any office for the sale of lottery tickets, or shall sell any lottery tickets, &c." It is not laid upon the property; it is not laid upon the person, nor on the income; it is not measured by the value of the property, nor the amount of the proceeds derived from the office, but is in fact a penalty on the act of opening, keeping open an office, or selling the tickets. It is not limited in its operation within any definable bounds, but may be ramified into as many ten thousand cases as there are persons concerned in the act of selling. The act also, in substance, declares its object to be the suppression of vice. It appears to me therefore as much a penalty as the sum of one hundred pounds formerly inflicted upon a person who should be convicted of killing a negro, and the question is, whether it is to be considered a tax merely because the act has called it so? If the nature of the thing can be changed by merely changing the name, every penalty may be converted into a tax. And there can be no doubt but that the numerous assaults and battery and other misdemeanors with which our courts are crowded, would become fruitful sources of revenue to the state. But it would be a commutation much more friendly to the civil list than to the liberty of the citizen; and if they had not been willing to have renounced the one, to have secured the other, the article of the constitution now under consideration, need never to have been penned. If it is to be considered in the nature of a penalty, (and I can have no other view of it,) it is a direct and manifest violation of the constitution. It is the last clause of the act, and in all probability was introduced near the close of the session, the period of time the least propitious to that due deliberation with which the acts of that body are usually marked. I cannot believe that there was an individual member of that Legislature, who would deliberately consent to authorize a tax-collector, at his arbitrary will and pleasure, to adjudge a person guilty of an act which

would subject him to a penalty of ten thousand dollars and issue his execution either against his goods or his person for the amount, without even the semblance of a trial. I have already shewn what is to be understood by the words in the constitution, "the law of the land." The constitution intended to impose a restraint upon the Legislature as well as upon the other departments of government; and it would have been idle to impose upon them a restraint which it was in their power to remove, by performing the very act which it was intended to prevent.— The constitution, says Judge *Patterson*, is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. It fixes the limits to the exercise of Legislative authority, and prescribes the orbit within which it shall move. It says to the Legislature, so far shalt thou go and no farther. Our constitution prohibits the Legislature to "deprive any man of his liberty, except by his peers, or by the law of the land;" yet this act gives to the tax-collector authority to adjudge the person accused, guilty of the act charged against him without a trial by jury, or in any other form, and to enforce the payment of the penalty by imprisonment, if he has no property out of which the money can be made; and if there is any principle of constitutional law by which it can be justified, I have yet to learn where it is to be found. I do not contend that the Legislature could not enforce such a penalty (or lay such a tax, if that phraseology is more agreeable, though I think it to be incorrect,) nor that they cannot prescribe the mode of compelling the payment of it, but that the liability of the party must first be established by a jury of his country, and not by the arbitrary fiat of any individual. The motion therefore must be granted, Justices *Colcock* and *Johnson*, concurred.

Hayne, Att'y Gen. for the motion.

Grimke, contra.

THE STATE vs. WM. MARSHALL and others.

The jurisdiction of magistrates is taken away in all cases arising from torts and trespasses; and therefore the penalty against a free negro for harbouring a slave under the act of 1740, cannot be recovered before a magistrate.

CHARLESTON Court of Appeals, January, 1822.—
Motion to reverse an order refusing a prohibition.

Mr. Justice *Bay* delivered the opinion of the court:

This was a case in which Mr. *Marshall*, a Justice of the Peace, and two freeholders, were about to try a free person of colour for harbouring a slave, belonging to *Anny Le Prier*, another person of colour; and the ground taken in favour of the motion was, that this was in nature of a civil injury, which by the act of 1740, imposes a fine of £10 old currency, for the first day, and 20 shillings every day after, to be recovered by any Justice of the Peace by warrant under his hand and seal, agreeably to the act for trial of small and mean causes. The motion, however, for the prohibition was refused, on the ground that the jurisdiction of magistrates was taken away in all cases arising on torts and trespasses, and confined to matters of debt and contract only by the act of 1791, so that such penalty could not possibly be recovered by a Justice of the Peace for said offence. And upon the further ground that the 29th clause of the negro act expressly declares, that in case such free negro or mulatto, &c. shall not pay the said penalty imposed by said act, and that the same cannot be levied, that such free negro or mulatto shall be ordered by the Justice to be sold at public outcry, and after paying the party the said penalty and charges, the overplus is directed to be paid into the treasury. From this decision below, refusing the prohibition, an appeal has been made to this court; and after hearing Mr. *White* in support of the motion, and duly considering the case, the Judges are

unanimously of opinion, that there are no grounds for overruling the decision of the Judge at Chambers.

The motion is therefore dismissed.

Justices *Colcock, Nott, Gantt, Richardson, and Johnson*, concurred.

White, for the motion.

——— contra.

GEORGE W. PRESCOTT vs. SEARS HUBBELL.

Wherever an insolvent debtor has through ignorance and a mistaken idea of his rights, or inadvertency, omitted to insert in his schedule those things which his creditors have a legal right to, and which he can convey over, the court before whom he applies for his discharge may suffer him to amend without sending it to a jury to try the question of fraud. (a)

CHARLESTON Court of Appeals, January, 1822.—

Mr. Justice *Bay* delivered the opinion of the court:

In October term, 1821, the petitioners case came before the court in the common and usual manner, and a motion was made for his discharge. Upon exhibiting his schedule in the common form, a motion was made by Mr. *Clarke* to send the case to the jury on the ground of fraud. A number of grounds were suggested as indicative of fraud on the part of the insolvent debtor; but among them all, only one of the allegations was supported by legal affidavits; namely, that the insolvent debtor was charged with being interested and concerned in a grocery store, and his interest in it was not included in the schedule rendered in by him. Upon this ground, the court was induced to order it to be sent to a jury to try the point of fraud for not including it in his schedule; but before the final order was entered, the Attorney General moved on behalf of the pe-

tioning debtor for leave to amend his schedule, and to insert all his interest, right and claim, (if any he had) in the said grocery store, so as to give the creditor the fullest benefit of the same. The court upon this motion, as it had been the practice of the court from time immemorial, to allow this indulgence in all cases of omissions or mistakes, in the conduct of insolvent debtors, who from ignorance or inadvertency, had omitted to insert things in their schedules, which the creditors had the least shadow of right to expect to be transferred, allowed the schedule to be amended, by inserting all the defendant's right, title, and interest in and to the said store in his said schedule for the benefit of his creditor to the fullest extent; upon which, the Attorney General and Mr. *Simons* moved that the petitioning debtor should be allowed the benefit of the act, and be discharged. This was opposed again by Mr. *Clarke*, still insisting that all his allegations of fraud should be sent to the jury; but the court overruled them and permitted the insolvent debtor to swear out under the act, upon the ground, that the necessity of sending that point relating to the grocery store, was superseded by the voluntary insertion of his right and interest in it in his schedule. And upon the further ground also, that as to the other allegations of fraud alleged, unless supported by the affidavits of indifferent and disinterested persons, the court would never send them to a jury, as was determined in the case of *Bingly vs. Smart*, (1 *McCord's Rep.* 29,) upon mere *ex parte* allegations of the creditor opposing the discharge. From this order of the court below, there has been an appeal to this tribunal, where the case has been very warmly and strenuously argued to rescind the decision in the Court of Common Pleas in October last; when, after a patient hearing and full consideration of the case, the Judges are of opinion that the motion should be refused, for the reasons urged in the course of the investigation in the court below; namely, that wherever an insolvent debtor has through ignorance or a mistaken idea of his rights or inadvertency, omitted to insert

in his schedule those things which the creditors have a legal right to, and which he can convey over, and he is willing and consents to make an amendment to his schedule rendered in, according to the very right and justice of the case, the court before whom he applies for his discharge ought to release him; and further, that such amendment, agreeably to the justice of the case, supersedes the necessity of sending such a case to the jury to try a fraud which has been removed by such voluntary amendments; and further, that the prison rules or bounds, within which an insolvent debtor has been confined, are to be considered the same as being within the prison walls or within the body of the gaol.

Justices *Colcock, Nott, Huger, Richardson and Johnson*, concurred.

Clarke and Hunt, for the motion.

Simons, contra.

(a) *Vide Bingley vs. Smart*, (1 McCord, 29.)

R.

ISAAC CARR and SARAH his Wife, and others, vs. JOHN W. JEANNERET.

W. made a residuary clause to his will in the following words:—"The rest and residue of my estate, both real and personal, to be equally divided between my two grandsons *Wilson* and *Thomas*, and delivered to them at the age of 21 years; but should they die, leaving no lawful issue, in that case I give and bequeath the whole of my estate, both real and personal, to *Richard Thomas* and *Mary Godfrey, Rebecca Potts* and *Thomas Ballow*, to be equally divided between them," Held, that *Thomas* (having arrived at 21 years, with issue,) took an absolute estate under the will, and *Wilson* having died under age, and without leaving issue, *Thomas* became entitled to the whole estate; and upon the death of *Thomas*, leaving issue, his children took by limitation and not by purchase.

That the intention of the testator ought to govern where it can be dis-

covered is a good rule; but wherever the will is plain, unequivocal, and in technical law language, it is unnecessary to resort to that rule of construction.

**COURT of Appeals, May, 1821. Trover for a negro
July.**

Mr. Justice *Bay* delivered the opinion:

This case comes up before the Court of Appeals upon a special verdict found upon the construction of the will of *William Wilson*, deceased. The words in the will, upon which the dispute arose, are the following, viz. "The rest and residue of my estate, both real and personal, to be equally divided between my two grandsons, *Wilson* and *Thomas*, and delivered to them at the age of 21 years. But should they die, leaving no lawful issue, in that case, I give and bequeath the whole of my estate, both real and personal, to *Richard*, *Thomas* and *Mary Godfrey*, *Rebecca Potts* and *Thomas Ballow*, to be equally divided among them." The special verdict then found that the negro in question formed a part of the residuary estate of the testator, and under the above will, came into the hands of his grandsons *Wilson* and *Thomas*; that *Wilson* died under age, unmarried and without lawful issue: that *Thomas* is now also dead, having arrived at 21 years of age; and that the said *Sarah*, who intermarried with the said *Isaac Carr*, and the plaintiffs *William Wilson* and *Hannah Wilson*, are the lawful issue of the said *Thomas Wilson*, deceased, and have survived him. If, under the legal construction of the above will, the court should be of the opinion that the testators grandson, *Thomas Wilson*, took an absolute estate in the residuary part of his grand fathers estate under the will, then they found for the defendant: And if on the contrary, the court should be of opinion that the said *Thomas Wilson* did not take an absolute estate in the residue of his grandfathers estate, then, they found for the plaintiffs 500 dollars.

On the part of the plaintiffs in this case, it was admitted that the negro in question had come into the possession of *Thomas Wilson*, the surviving grandson of the testator, and that he had sold him to the defendant. But it was contended that this sale was void, inasmuch as it was alleged that *Thomas Wilson* took only a life estate in the residuary part of his grandfather's estate; and upon his death, the whole went over to his heirs or children as purchasers under the above will, and that *Thomas*, the grandson, after the testator's death, had nothing more than a life estate, and that no act of his, during his life, could defeat the right of his children or issue under the above will, who took as purchasers. In support of this construction, a great number of authorities were quoted and relied upon, some of which I shall remark upon in the course of this opinion. In opposition to this construction, it was contended by *Wilson* and *Prioleau* for the defendant, that by the clause of the will in question, an absolute estate was created and vested in the grandsons *Wilson* and *Thomas*; and that upon the death of *Wilson*, unmarried and without lawful issue, it vested in *Thomas* the surviving grandson. That the word estate, mentioned in the clause of the will, constituted a fee; and that there were no words in the will controlling or altering the nature of this estate, and that consequently the whole vested in the first taker, *Thomas Wilson*, (3 *Mod.* 220.) That it is an invariable rule in the construction of wills, that the intention of the testator shall always prevail wherever such intention can be discovered; and that it was obvious in this case that the intention of the testator was to give the residue of his estate, both real and personal, to his two grandsons. It is true, and they admitted that there was a contingency mentioned in the clause of the will, that in case of their dying without issue, the estate should go over to the *Godfreys* and others; but as this contingency had actually happened and taken place, there was an end put to the contingent remainder. But the estate did not vest in *Thomas*, the surviving grandson upon the contingency of

his having lawful issue, for it had vested before on his arrival at 21 years of age, although the contingent remainder depended on that event. These were the principal grounds relied upon on both sides of this case.

I have considered this case and the arguments of the counsel, and am of opinion that the words of the clause in this will may be considered as an executory devise of real estate, and as a bequest or legacy of personal property, as it includes both real and personal estate, which depend on the same principles. Every devisee is in nature of a purchaser at law, and shall be preferred to the heir at law. (3 Co. 12. 2 Atk. 437.) If the court should admit of a difference between real and personal, it would be productive of great confusion. (2 Atk. 314.) Lord Kenyon laid down the same doctrine in 3 D. & East. 146, i. e. that the rules of law are the same in regard to real as to personal estate.— If such a distinction, said he, existed in law, it would not agree with the rule, *lex plus laudatur quando ratione probatur*. Now let it be asked what is the true and legal operation of these words, either as to real or personal property? For upon the solution of this question, every thing depends. But first, as it regards real estate. Indeed it was admitted in the argument, that the word estate will constitute a fee, unless controlled by other words. Now as to real estates, it is very clear, that “a devise of all testator’s real estate,” passes a fee, as was determined in the case of *Reeves vs. Winnington*, 3 Mod. 45–6.— The question there was, whether by these words the devisee had an estate for life or in fee, of the messuage in question, and the court were of opinion that the words “all my estate,” were sufficient to pass an estate in fee simple. This I take to be a leading case in the books, as it refers to no less than between 20 and 30 cases on that subject, a few of which I now refer to. (Cas. Temp. Talb. 110–11, 157. Lord Raymond, 187, 1327. Prec. in Can. 37, 264, 461. 2 Pr. Wms. 523, 335. 3 Pr.

Wms. 295, 193, 386. 4 *Mod.* 89.) The word "estate" in a will passes a fee. (*Salk.* 236. 6 *Mod.* 106.) So far from its being necessary to insert words of inheritance in order to give this operation, words of restraint must be used to carry a less estate. (4 *Bacon*, 253.) Again, A. devises lands to his son and heirs, and if he die before the age of 21 years, and without heirs of his body then living, the remainder over, &c. He survives the 21 years, and sells the land, and the sale was adjudged good; for he had a fee simple presently; the estate tail being to commence upon a subsequent contingency. (*Collenson vs. Wright*, 1 *Sid.* 148. 1 *Eq. Cas. abr.* 176.) The word estate is *genus generalissimum*, under a sweeping clause; the rest and residue of testator's effects, real and personal, it carries the fee of lands. (4 *Bac. abr.* 253.)

2. As these words regard personal estates, when considered as a legacy or bequest, the law is equally clear that they will constitute a vested legacy of personal property. Mr. *Burn*, title Vested Legacies, says, if a legacy be given to one, to be paid at a future day, this is a vested legacy, an interest which commences in *presenti*, although it be *solvendum in futuro*; and if the legatee dies before the day of payment, his representatives shall receive it at the time it would have become payable in case the legatee had lived. But if a legacy be given to one when he attains such an age, and he die before that time, in such a case, it is a lapsed legacy. The same doctrine is laid down in 2 *Black.* 513; treating of legacies, he says, if a legatee die before the testator, the legacy is lapsed, and shall sink into the *residuum*, and if a contingent legacy be left to any one, as when he attains the age of 21 years, and he dies before that time, it is a lapsed legacy. But a legacy to one, to be paid when he attains the age of 21 years, is a vested legacy; an interest which commences in *presenti*, although it be *solvendum in futuro*; and if the legatee die before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the

legatee had lived, (2 *Black.* 513.) So that whether the clause in the will be considered either as applicable to real or personal estate, it appears to me to be equally clear, that it carried over, both real and personal, an absolute estate to the surviving grandson of the testator, and that the whole vested in him upon the death of his brother *Wilson*. The law is so plain upon this head, and the authorities so numerous, that it would be almost a waste of time to quote them all, or to run through them on the subject. In 1 *Eq. Cas. Ab.* 294, it is laid down, that if a sum of money is bequeathed to one at the age of 21 years, or day of marriage, to be paid him with interest, and he dies before either, yet the money shall go to his executors; (2 *Vent.* 342. 2 *Chan. Cas.* 155. 2 *Salk.* 415. 2 *Vern.* 199,) so decreed per *Finch C.* and this decree was affirmed upon an appeal in the house of lords: (1 *Eq. Cas. Ab.* 294.) But if money be bequeathed to one at the age of 21 years, and he dies before that age, the money is lost. (2 *Chan. Cas.* 155. 2 *Salk.* 415.) The true rule and distinction in all these cases is this, that if a legacy be devised to one generally to be paid or payable at the age of 21, or at any other age, and the legatee die before that age, yet it is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum in futuro*; the time being annexed to the payment, and not to the legacy itself. But if a legacy be devised to one at 21 years, or if, or when, he shall attain the age of 21, and the legatee die before that age, then it is a lapsed legacy. (1 *Eq. Cas. Ab.* 2 *Salk.* 415.)

It was admitted in the course of the argument, that the word "estate" would carry over a fee, unless controlled by other words in the same will. Now what are the other words in this will which can control the strong language of the testator in this residuary clause? Why they are the following; "but should they die leaving no lawful issue, in that case, I give and bequeath the whole of my estate, both real and personal, to the *Godfreys*, &c.

to be equally divided between them." The plain construction of which is, that if my said grandsons should die without leaving children, living at the time of their death, then the residue of my estate, real and personal, should go over to the *Godfreys*, &c. But *Thomas* did arrive at the full age of 21 years, and left three children, lawful issue. The conditions, therefore, of his arriving at the age of 21, and having lawful issue, both happened, which prevented the estate from vesting in the *Godfreys*. It was admitted that if *Thomas* had never arrived at the age of 21, and had died without lawful issue, in that case, it would have been a good remainder in fee to the *Godfreys*, &c. but as the double conditions were both performed, it never could go over. There appears to me, therefore, to be nothing to control or defeat the strong operation of law in carrying over the estate to *Thomas*, the surviving grandson, agreeably to the devise of the testator. But it is said that the operation of law would carry over the estate to the children of *Thomas*, the grandson, to his heirs and purchasers under the will of their great grandfather. The gentlemen, however, who argued this case for the plaintiffs did not point out the words of this will, to shew by what possible event or contingency the plaintiffs could be considered as purchasers under their great grandfathers will. There is not one sentence in the will which ever gave them the property, either expressly or impliedly. They were left as the law would unquestionably leave them, dependent upon the bounty of their father, and in case of his death, entitled to such proportion or proportions of his estate as he should die possessed of, or entitled to at the time of his death. It was, however, contended that the words, dying without issue, would carry the property over to them by implication, and 1 *Pr. Wms.* 663. was quoted for that purpose. I have examined this case, and it was much relied on. It was a case in which one possessed of a term devised it to A. and B. and if either of them died without leaving issue of their respective bodies, then to C. This was held to be a good limitation to C. if A. or B. left

no issue at the time of their death. From this case, it appeared that A. and B. left no issue at the time of their death, and as the estate was carried over to C. in that event, it was a good limitation. So in the case under consideration, if *Thomas*, the grandson, had left no children, the estate to the *Godfreys*, &c. might have been a good limitation. But he did leave issue, therefore the remainder never vested. The cases, therefore, in my opinion are by no means parallel. The case quoted and relied on, from 3 *D. & East*. 143, is exactly a similar case. It was a case where lands were devised to A. his heirs and assigns for ever, (i. e. a fee simple estate,) and if he should die leaving no issue behind him, then over, &c. this was held to be a good limitation over, by way of an executory devise. If *Thomas Wilson* had died without issue, this would have been a good executory devise to the *Godfreys*, &c. In such a case, this authority would have been in point. But as he left three children at the time of his death, it can have no possible application. The case of *Dott vs. Wilson*, in our own court, 1 *Bay*, 452, was relied on. The words of the will of Mrs. *Baker*, the deviser, were very different from those in the present case. It came also before the court on a special verdict, which stated that “*Sarah Baker* bequeathed one fourth part of her estate, consisting of negroes, to her daughter *Sarah Dott*, during her life, (without the control of her husband,) and at her death to the heirs of her body, and their heirs and assigns for ever.” The first part of this will created only a life estate in Mrs. *Dott*; the second part of it created an estate tail, and if it had stopped at the heirs of her body, it would have been too remote, and the property would have vested in her absolutely as the first taker; but the superadded words, after the words, “heirs of her body,” and their heirs and assigns for ever, restrained the generality of the estate tail, and made it a joint tenancy in her children, who took as purchasers under the mother's will. Now this case is very distinguishable from the one under consideration. In the first place, Mrs. *Dott* had

only a life estate, so that she could not sell or do any act which would defeat the right of her children after her death. And in the second place, the words added to that part of the will which would have created an estate tail, altered the very nature of it, and made it a joint tenancy in her children living at the time of her death, who took as purchasers; whereas, in the case under consideration, the estate given to *Thomas Wilson* was an absolute and unconditional fee simple, and there was no limitation over to the heirs of his body, or to their heirs: nothing is given them by this will; they are merely named in the description of the contingency on which the estate was to go over to the *Godfreys*, &c. which brings this case under the authority of the case of *Bamfield & Wetten*, (2 Bos. & Puller, 324,) quoted by the counsel for the defendant, in which it was held that where the whole fee is given to one, her heirs and assigns; no further limitation can be limited upon that fee. From which, it is evident to my mind, that there is nothing in the present testators will which can possibly carry the estate over further than the fee which was vested in *Thomas*, the grandson, by the terms of the will, unless indeed he had died without leaving issue at the time of his death. Besides, it was very properly observed by the counsel in the argument for the defendant, that the intention of the testator ought always to govern where it can be discovered. This is a good rule in all doubtful and ambiguous wills; but wherever the will is plain, unequivocal and in technical law language, it is unnecessary to resort to that rule. If, however, it was necessary to resort to that rule of construction, I think it is reasonable to conclude, that when the grandfather was about disposing of his worldly concerns, that he would be most solicitous and careful in making provision for those of his posterity that he knew, and that were then existing, than in providing for those who were not in being, or who probably might never exist. Hence, the care and circumspection he seems to have exercised in making a division of his estate between grandsons then living; and

trusting to their care and assiduity, the business of making provision for their offspring in their turn, should they at a future day have any to provide for : And, hence also, the bare meaning or mentioning of such possible offspring as a description of the contingency on which the estate was to go over to his distant relations or connexions. But in the case before us, there is no occasion to resort to this rule of construction, as the terms of this will are sufficiently clear and explicit, and expressed in legal terms, so as to vest in the grandson *Thomas*, a good and absolute estate in fee of the premises in question ; and as such, he had the right to dispose of the same in any manner he thought proper. I am, therefore, clearly of opinion that judgment ought to be for the defendant, and that the *postea* should be delivered him to enter up his judgment thereon.

Justices *Richardson*, *Gantt* and *Colcock*, concurred.

Mr. Justice *Nott*, was absent from sickness, and Mr. Justice *Johnson* in the court below.

Mr. Justice *Huger*, dissented.

King, for the motion.

Prioleau & Wilson, contra.

As the Courts of Law and Equity of this State have differed in the construction of the will, involved in the above case, we deem the importance of the principle in question, and the interest the decisions have already excited, must render the possession of the opinions of both courts desirable to the members of the Bar. In consequence of such an impression, we will here insert the Decree of the Court of Equity.

DECREE.

In the Court of Appeals. Columbia, May, 1822.

ISAAC CARR and others vs. JAMES GREEN.

Chancellor *Waties* delivered the opinion of the court :

A Bill was brought by the complainants in the Circuit Court of Georgetown, to set aside a conveyance in

fee of a tract of land made to the defendant by their late father *Thomas Wilson*; which land, they allege was devised to him for life only, and to them in remainder, by the will of their great grand-father *William Wilson*. They allege also in their bill that they are minors, that the title deeds of the lands are in the hands of the defendant, that he had obtained the said conveyance from their father by fraudulent means, and that being doubtful of its validity, he had taken various securities from him as an indemnification. The bill, therefore, prays that the defendant may be compelled to deliver up to the complainants the possession of the land, with the title deed belonging thereto, and also to account to them for the rents and profits thereof from the death of their father when their title accrued.

The defendant both answered and demurred. In his answer he admits the will of *William Wilson*, and that *Thomas Wilson* held the land under the said will; he admits also that he purchased the same from him by giving another tract of land in exchange, and took the alleged indemnification; but he denies the fraud charged in the bill. The demurrer is to the jurisdiction of the court, on the general ground that the complainants "had not made out such a case as would entitle them to any discovery or relief in Equity, and that they had a full and ample remedy at law." The Circuit Court entertained the bill, and decreed that the defendant should deliver up to the complainants the land and title deeds, and account to them for the said mesne profits.

From this decree the defendant has appealed, and insists on a number of objections; but the three following comprise all that require any discussion from the court:

1st. That the Circuit Court proceeded to decree upon the face of the bill, without hearing argument except on the demurrer, and without testimony on either side."

2d. "That the Circuit Court assumed a jurisdiction not warranted by the laws of the land in taking cognizance of

the case, because the complainants had a plain and adequate remedy at law."

3d. "That the Circuit Court assumed a jurisdiction not warranted by the previous usage of the same, in trying the validity of a title to a freehold between adverse claimants."

1st. It is sufficient answer to the first objection, to state that the right now contested had been before adjudicated. In the case of *Grant and others vs. Thompson and others*, the creditors of *Thomas Wilson* brought their bill against the defendants, who represented the interests of the present complainants, to make the estate of *William Wilson* liable for the debts of *Thomas Wilson*, on the ground that he took an absolute estate under his grandfather's will. The Circuit Court decided the contrary, and on an appeal to this court, it was the unanimous opinion of the Judges that, according to the true intention of the testator, which was sufficiently manifested by the words of the will, *Thomas Wilson* took only an *estate for life*, and his issue, the present complainants, took a *remainder in fee, as purchasers*.

At the hearing therefore of the present case, the defendant having admitted by his answer, as well as by the demurrer, that he held the land under *Thomas Wilson*, whose right was derived from the will of *William Wilson*, and the Court of Appeals having declared such right to be only for life, and the remainder to be now vested in the complainants, it would have been improper to have allowed the same right to be again controverted on the same ground.

It was *res judicata*, and the decree of the Court of Appeals ought to be regarded in that and every other court as a conclusive title for the complainants, to every part of the estate of *William Wilson*, depending on the construction of his will. Two cases decided by the Constitutional Court are strong authorities for this. *Woodward*

vs. *Starke*, 1 *Nott & McCord*, p. 329 ; and *Scott vs. Cohen*, 2 *Nott & McCord*, p. 298.*

It was unnecessary for the same reason, to inquire into the charge of fraud, for the proof of such a charge would not have strengthened the right of the complainants, nor would the disproof of it by the defendant have benefitted his claim. The counsel, therefore, on both sides, were properly confined to the questions founded on the demurrer, and the face of the proceedings.

2d. The second objection is, "that the Circuit Court assumed a jurisdiction, not warranted by the laws of the land, in taking cognizance of the case, because the complainants had a plain and adequate remedy at law."

Every objection of this kind is entitled to the most serious consideration. It is of great importance that the boundaries between Equity and Law should be distinctly ascertained. Without this, the parties to a suit could not know by which system of rules they were to be governed, and the Judges of the two courts would often be at a loss what judgment to pronounce. If this did not impair the rights of the citizens, it would at least render the remedies for them uncertain, which would be productive of much trouble and expense. But there is no ground for apprehending this mischief in the present instance. It ap-

NOTE BY MR. KING OF CHARLESTON.

* The case of *Starke vs. Woodward*, referred to by the Chancellor in his decree, was tried before Judge *Nott*, "and the only question made, was whether the decree of the Court of Equity was final and conclusive as to the right of property. The presiding Judge held that it was so, and refused to let the defendant introduce any testimony to controvert it." In delivering the opinion of the Constitutional Court, the same learned Judge cites, and no doubt sanctions by his citation from *Gahan & Main-gay's Irish Term Reports*, p. 40, the observation of Chief Justice *Lee*, "that Courts of Law pay such deference to the judgments of each other, in matters within their jurisdiction, that the first determination by a proper authority ought to prevail." And in the case of *Scott vs. Cohen*, Judge *Bay* in delivering the unanimous opinion of the Constitutional Court on the point there determined, seems to concede a superiority to the Court of Equity, which very certainly has never been claimed by the Judges of that Court. His Honor says, "But if any doubt

appears to all the Judges that the complainants had not a plain and adequate remedy at law, and that the case came fully within the established jurisdiction of the court. It came within the principle recognised as a settled one in *Weymouth vs. Boyer*, 1 *Ves.* 424, "that if the remedy at law was difficult in a case, the court would not pronounce against the jurisdiction;" for it is obvious, from the circumstances stated in the decree, that without the interference of this court, the complainants would be exposed to all the litigation there adverted to. In the case also of *Bond vs. Hopkins*, 1 *Sch. and Lef.* 429, it was said by Lord *Redesdale*, "nothing is better established in Courts of Equity, than that where a title exists at law and in conscience, and the effectual assertion of it at law is obstructed, relief should be given in Equity."

But there is another and plainer ground of jurisdiction in this case. The complainants had a right under the special circumstances of their case, to bring their bill, for an account of the *mesne profits*. The act of 1791, provides indeed a very convenient *legal* remedy, by empowering a jury to award damages for mesne profits in the same verdict by which the land is recovered. But the act does not say that this shall be the exclusive remedy; it only declares that in future one legal remedy shall serve both for the title and the mesne profits; it therefore only alters the common law, which required that there should

could arise upon the construction of the common law, surely none can remain now after the Decree of the Court of Equity. This is certainly the highest Court of Judicature in Carolina, inasmuch as it, in many cases, controls the courts of common law; all the parties were before that court, and their claims and pretensions to this very land in dispute, among others, were before it and fully investigated, and after mature deliberation, they decreed the lands of old *William Scott*, the uncle, to have become vested in *William Scott*, his nephew. *This court is bound by that Decree*, we cannot unravel it, or say it was not founded in law and justice. On the contrary, the respect due to so high and solemn a tribunal, compels us to submit to its decrees; and in the case of *Starke v. Woodward*, 1 *Nott & McCord*, 259, 329, lately determined at Columbia, the same doctrine was laid down, and determined by the unanimous assent of all the Judges."

be first an ejectment to establish the title, and afterwards an action of trespass to recover the mesne profits. But the jurisdiction over the subject, which before belonged to the Court of Equity, still remained, and it will appear from a number of authorities, that it was properly exercised in this case.

In *Dormer vs. Fotescue*, 3d Atk. 129, the chief object of the bill was to have an account of the mesne profits, and it was asked by the opposite counsel, "what hinders the plaintiff from bringing an action of trespass for the mesne profits, which may be done with as much ease and less expense than an account taken before a master?" Lord *Hardwicke* said, "I am of opinion under the circumstances of the case, that the plaintiff has a right to come into this court for that purpose." And he adds, "there are several cases where this court has decreed such an account. As in the case of a bill brought by an infant to have possession of an estate, and an account of rents and profits, the court will decree an account from the time the infant's title accrued; for every person who enters upon the estate of an infant enters as a guardian or baliff for the infant." And so says *Lyttleton*. Lord *Hardwicke* further states, that there are instances where, upon a mere *legal* title, the court have decreed an account of rents and profits; and he refers to the case of the infant as one instance; also to the *Duke of Belton vs. Dean*, *Prec. in Cha.* 516, where the title was at law, and yet the court decreed an account. He cites also *Bennett vs. Whitehead*, 2 P. W. 644, a still stronger case, in which he says, "I was counsel in it myself, and it was a mere *legal* title, and the deeds were in the custody of the plaintiff himself." An exception is made, conformable to the civil law, of one who is *bona fide possessor*, who shall not account. But this means, says Lord *H.* "where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title." Against such a one, it is admitted, the remedy must be at law. So, where the claim is not that of an infant, where no title deeds are sought for,

no difficulty in the legal remedy, no trust, a bill will not be entered for mesne profits. But in the present case, the complainants are minors, they seek for the title deeds, their rights have been already established in this court, their legal remedy is a complicated one, and the possession of the defendant was obtained with a full knowledge of her claim. On all these grounds, then the complainants had a right to come into a Court of Equity for the mesne profits.

3d. The third objection is, "that the Circuit Court assumed a jurisdiction not warranted by the previous usage of the same in trying the validity of a title to a freehold between adverse claimants."

The discussion of this subject might be avoided, by insisting, that the fact on which it is founded, did not occur in the case. The validity of the title was not tried by the court. This, as has been before stated, was considered as conclusively settled by the Court of Appeals.

But this objection is also unfounded, on principle. If it should prevail to the extent contended for, it would deprive the Court of Equity, of a large portion of it's jurisdiction ; for the title of lands depending on the construction of wills, is a direct and frequent subject of its cognizance. As a general rule it will not be denied, that a title to land must be tried at law ; but in certain cases a Court of Equity may also take cognizance of it. This fully appears from the cases already cited, but the following are more explicit on the point. In *Tanner vs. Wise*, 3 P. W. 296, it was expressly held, that "where a title to lands depends on the words of a will only, it was as properly determinable in equity as at law." And the court there decided on the title, although the bill only prayed for the delivery of the title deeds. In *Dupont vs. Scott*, heard before me in Charleston, 1818, and afterwards before the Court of Appeals, the jurisdiction of the court was carried still further. The complainants claimed a tract of land from the defendants, on the ground that it was held as a trust, and I had no doubt that the original possession

ought to be regarded in that light; but as the defendants insisted on a title by adverse possession, and there was evidence of acts done by them which might amount to a legal *disseisin*, I thought it most proper to direct an issue to try that title at law, as had been before done in the case of *Ramsay vs. Deas*, 2 *Equ. R.* 289. But on the appeal this court took entire cognizance of the question, declared the whole possession a trust, and decreed that the defendants should deliver up the land to the complainants. The same course appears to have been taken in the case of *Bond vs. Hopkins*, 1 *Scho. and Lef.* 422.

On a bill for the recovery of lands which were there alleged to be fraudulently held, the defendant set up an adverse title by possession.

The master of the Rolls decreed, that the plaintiff should have leave to bring his ejectment, but that the statute of limitations and other legal impediments should be no bar to his suit.

The Lord Chancellor afterwards, on an appeal examined, himself, the adverse title, enlarged the decree, and ordered the defendants to deliver up the lands. It is evident from these cases, that the cognizance which a Court of Equity takes of the title to land is perfectly consistent with the general jurisdiction of the Court of Law. It determines on a title depending on the construction of a will, because this is a subject only of interpretation; and it relieves against an adverse possession on the ground of fraud, or of a constructive trust. But in all cases of a *bona fide* adverse possession, or any other common title to land depending on evidence *in pais*, the jurisdiction is acknowledged to belong exclusively to a Court of Law.

Here we might conclude the discussion of this case. The views which have been taken of the competency of the ordinary jurisdiction of the court, on all the points objected to, render it necessary to resort to the extraordinary ground on which the Circuit Court partly rested its decree. And we are glad to be relieved from the duty of maintaining a ground which would involve this court in a

conflict of jurisdiction with the Court of Law. Such a conflict ought, if possible, to be avoided, for the obvious tendency of it must be to lessen the public confidence in one of the courts, and perhaps of both; the evil effects of which would be felt by the whole community.

But we cannot affect to be ignorant that the construction given by this court to the will of *William Wilson* in the case of *Grant and al. vs. Thompson and al.* has been since judicially impugned, and has also excited much professional interest. It is therefore, thought necessary to give to that case a more full consideration than it before received; and it is believed that the result of this will shew that the former opinion of this court is supported by the soundest principles both of law and equity.

The words of the will of *William Wilson* which are material to be considered are the following—"The rest and residue of my estate, both real and personal, to be equally divided between my two grandsons *Wilson* and *Thomas*, and delivered to them at the age of 21 years, but should they die *leaving no lawful issue*, in that case I give and bequeath the whole of my estate, both real and personal, to *Richard, Thomas* and *Mary Godfrey, Rebecca Potts* and *Thomas Ballow*, to be equally divided between them."

The testator's grandson *Wilson* died under age, and without leaving issue. By this event his moiety accrued to the surviving grandson *Thomas* and his issue, as a cross remainder by implication.

The words "*should they die leaving no lawful issue*," are sufficient to raise this implication. It has been expressly so ruled in the following cases, *Holmes vs. Meynell*, *T. Raym.* 453. *Wright vs. Holford*, *Cowp.* 31. *Phipard vs. Mansfield*, *Id.* 800. *Mackell vs. Winter*, *3 Ves.* 541. And *Green vs. Stephens*, *17 Ves.* 74.

The testator has also said that his *whole estate*, and not a part, shall go over to the ulterior remainder-men; this is saying in other words that the limitation shall not have effect until a failure of issue of both his grandsons, which

necessarily implies that they were to take cross remainders.

We must consider then the devise as confined to the grandson *Thomas Wilson*, and the only question to be examined, will be, what estate did he take under the will? This court has decided, that he took by necessary implication an estate for life, and that his children became entitled, at his death, to the remainder. It has, however, been strenuously insisted that the words of the will gave an absolute estate to *Thomas Wilson*, and no distinct interest to his children. And in order to shew this, it has been very elaborately argued, that a devise of "all a man's estate" passes a fee; also, that a legacy, "payable at a future day," vests an absolute interest; from which, it is *concluded*, that the devise of *William Wilson* of "the rest and residue of his estate to be delivered to his grandsons at the age of twenty-one years," gave them a fee simple. Both of these general positions are such plain legal truths, that no Judge would hesitate in assenting to them; and if the question now under consideration depended on those positions only, the conclusion drawn from them would admit of no controversy; but the question rests on other grounds. The testator uses other words, which shew a different intention; and we are of opinion, that these will control the legal effect of the preceding words.

In every question arising out of a will, the first inquiry should always be, what did the testator intend? If his intention is plain, it will control the technical sense of words; if it is obscure, the technical sense must prevail. Every Judge professes to follow this rule, but in the application of it to particular cases, it is often difficult to determine whether the popular or the technical sense shall predominate, and the cases, therefore, abound with contradictory interpretations of both. This ought greatly to diminish the authority of precedents in every question of this kind. If it depends on intention only, precedents are of no authority; for as the plain intention of every will

must govern it, so the intention of every testator can only make the law for his own will. Nothing, indeed, can be more unjust and absurd, than to insist that the intention of a testator, who died one hundred years ago, should explain the meaning of every other testator who has used similar words since, and should make the law for every other will in which they have been used. All that can justly be required is, that where technical words alone are used, unexplained and uncontroled by any others, their technical sense shall be taken as the testator's meaning; and that precedents shall determine that sense.

As the construction of the will before us must rest chiefly on intention, it is of importance before going into the consideration of it, to shew from the opinions of some of the most enlightened Judges, its over-ruling and almost unlimited control over technical construction.

“If the words of a will (says Lord C. *Macclesfield*) can bear two senses, one whereof is more common and natural than the other, it is hard to say a court should take the will in the most uncommon meaning; to do what? to *destroy the will*. A testator who is *inops consilii*, will, under such circumstances, be supposed to speak in the *common and natural*; not in the *legal sense*.”— (*Forth vs. Chapman*, 1 P. W. 666.)

Mr. Justice *Buller*, in speaking of the rule of intention, says, “This is the first and great rule in the exposition of all wills, and it is “a rule to which all others must bend.”

And after stating its subjection to the great principle of national policy alone, which forbids any perpetuity, or any tendency to it, he adds, “I know of no case, which says, that a technical sense of “*any words whatever*, shall prevail against it.” (*Hodgson vs. Ambrose*, Doug. 327.)

Lord *Thurlow* too, in referring to Mr. *Fearne's* discussion of the doctrine of Contingent Remainders, adopts this as his conclusion, “that the Court of Chancery will go any length possible to carry the intention of the testator into execution, for the benefit of those to whom the

testator designed a benefit." (*Knight vs. Ellis*, 2 Bro. 66, 557.)

Lord *Alvanly* too, (while master of the rolls) thus expresses himself—"I know only one general rule of construction, equally, for Courts of Equity and Courts of Law, applicable to all wills. The intention is to be collected from the whole will taken together. *Every word is to have its effect.* Every word is to be taken according to the *natural and common import.*" (*Thelusson vs. Woodford*, 4 Ves. 329.)


But, however full these authorities may be to establish the general rule of intention, it must be admitted that they do not carry it to the extent which the will under consideration requires. The construction which this court has given to the controverted words, rests on an implied *intention*, and it is therefore further necessary to shew that such an intention comes within the general rule. I refer then, in the first place, to the great modern commentator on the law, Mr. Justice *Blackstone*, who thus lays down the rule. "By *will also*, an estate may pass by *mere implication*, without any *express words*; and in general where any implications are allowed, they must be such as are *necessary*, or at least *highly probable*. And herein, there is no distinction between the rules of law and equity. The will is construed in each with equal favor and benignity, and expounded rather *on its own particular circumstances*, than *by any general rules of positive law.*" (2 *Blackstone's Com.* 381.)

Mr. *Fonblanque*, a profound commentator on the law of Equity, comes to the following conclusion, after a full examination of all the cases on the subject. "In the construction of a will, an estate may "*arise, be enlarged, controled, and even destroyed by implication.*"—(2 *Fonb.* 56.)

Lord *Kaims*, also, in his "*Principles of Equity*," (2 vol. 239,) has a distinct chapter on *implied will*, and thus defines it: "*Implied will*, where made clear from circumstances, ought to have the same authority with ex-

pressed will. The only use of words is to signify will or intention, and from the very nature of the thing, will or intention cannot have greater authority when expressed in words, than when ascertained with equal clearness by any other signs or means."

In *Oates vs. Cooke*, (3 Burr. 1686,) Mr. Justice *Wilmot* said, "If it be necessary to imply intention, it is the same thing as if it was particularly expressed."

And in *Robinson vs. Robinson*, (1 Burr. 51,) the Judges certified unanimously their opinions, "that an estate tail must be raised by *necessary implication*, to effectuate the manifest general intent of the testator, notwithstanding an express estate for life and *no longer*."— This opinion was affirmed by the House of Lords. And it is worthy of remark, that this case was sent out of Chancery, where Lord *Hardwicke* had previously declared an opinion, that as the devise was expressly for life, and *no longer*, it could not, by any necessary implication whatsoever, be construed to be an estate tail, (3 Atk. 786.) It appears then that the rule was carried to its greatest extent by a Court of Law. 

I will conclude this preliminary view of the subject, with the opinions of several eminent Judges on the true meaning of what is called *necessary implication*. In considering an analogous subject, Lord *Eldon* observes, "That since it has been laid down that express words are not necessary, there must be in the will, that which is sometimes denominated *evident demonstration*, sometimes *plain intention*, or sometimes *necessary implication*. Thus much can be collected from the cases; but when you proceed further and inquire what it is that constitutes this evident demonstration, plain intention, or necessary implication, it appears to me that Lord *Alvanly* is right when he says, "you are not to rest on conjecture; but the mind of the Judge must be convinced that he is deciding according to what the testator intended." Lord *Alvanly* also adds, in the case here referred to, "It must be such an inference as leaves no doubt on the mind

of the person who is to decide upon it ; but it need not be such that no man can doubt upon it." (*Brummel vs. Prothero*, 3 *Ves.* 113.)

Lord *Eldon* goes on to observe, " that the same circumstances have, in the minds of different Judges, led so often to different conclusions, that Lord *Thurlow*, in a similar case, expressed his opinion, " that the notion of deciding by *precedent*, in questions of this nature *must be abandoned*; and that the court must, in every such case, abide by the *clear intention*; which indeed all judges affect to go upon, but seldom agree upon the principles to be applied in collecting it," (*Bootle vs. Blundell*, 1 *Meriv.* 219.)

These opinions are of high authority in two respects.— They not only define the meaning of *implied intention*, but they support the position before taken, that precedents are of little weight in all questions of mere intention.

I come now to the consideration of the particular words in controversy.

The testator devises " the ~~rest~~ and residue of his estate to be divided between his grandsons at the age of 21 years," and adds, " should they die leaving no lawful issue," then the whole to go over to the *Godfreys* and others.— This court has determined in the case of *Grant v. Thompson*, that these words, " leaving no lawful issue" manifest a *plain intention* in the testator to provide distinctly for the issue of his grandsons, if they should leave any.

And if the common sense of the community could be consulted on it, there would not probably be found one mind which would hesitate in deciding that this must have been the intention of the testator. It is very clear that the persons to whom the estate was limited over, could take nothing if the grandsons left issue.

The testator must therefore have intended that the issue should take something. And what could this be but the *intermediate* estate? It has been said that the issue were only named to describe the contingency on which the

estate was to go over ; and the case of *Barnfield vs. Wetton*, (2 *Bos.* and *Pul.* 328,) has been cited, in which lord *Eldon*, the C. J. of the Com. Pleas, put this construction on similar words.

As that case has been greatly relied on, it will be necessary to give it a particular examination. The devise was of certain lands “ to S. S. *her heirs and assigns for ever*, but if she should die *leaving no lawful issue at the time of her death*,” then a devise over, &c. S. S. died without leaving issue, but had before suffered a recovery of the premises to the uses of her will ; and the sole question was whether the limitation over was a contingent remainder on an executory devise. The court determined that it must be construed an executory devise, because there was an express estate in fee given to S. S. and a contingent remainder could not be raised on such an estate. As the testator, however, must have named the issue for some beneficial end, and every word of a will must have its effect, the subsequent words “ if she should die leaving no lawful issue” could not be overlooked ; and Lord *Eldon* got rid of the difficulty which they interposed, by supposing that they were merely intended as a description of the contingency on which the limitation over was to rest ; and that the power which S. S. would have of providing for the issue, by taking an estate in fee, would satisfy the intention of the testator with respect to them. Such a construction, however objectionable it may be, will not be disputed, because it appears to be founded on what the court *supposed to be the intention of the testator* in the case. But if this was the foundation of that decision, we may also be allowed to decide the present case on the same independent ground. The words here are different, and it is the intention of a different testator which is under consideration. We are not bound, therefore, to come to the same conclusion with Lord *Eldon*, in his construction of similar words in another will ; and for this we have not only the authority of Lord *Thurlow*, as before stated, but even the authority of Lord *Eldon* himself, who in de-

ciding on a question of intention on another occasion has said, "I do not mean it should be inferred that other Judges might not come to a conclusion respecting this will the reverse of that which I have come to ; on the contrary, I hold that a difference of opinion will always be unavoidable in cases of this nature." (*Boote vs. Blundell*, 1 *Meriv.* 239.)

This case then of *Barnfield vs. Wetton*, is no authority on the question of intention. But it would be a fatal authority for the claims derived from sales by *Thomas Wilson*, if the legal ground assumed in it was applicable to the case before us. It was cited for the purpose of shewing that the will of *W. Wilson* gave a fee simple to the grandsons, and if they left no issue, an executory devise to the *Godfreys* and others.

But the advocates for this construction do not seem to be aware that the legal effect of it would deprive the grandsons of the power of alienating any part of the estate during their lives, and thus afford as effectual security to the issue for their interests as the construction for which we contend.

In this same case of *Barnfield vs. Wetton* Lord *Eldon* expressly says, "If this be a good executory devise, a recovery will not bar it ; and it is equally true, that the courts always endeavor to construe a limitation, a contingent remainder, rather than an executory devise. The policy of the latter rule is founded on the very circumstance that an *executory devise cannot be barred*." The recovery therefore which had been suffered by the tenant in fee, was set aside.

So in *Porter vs. Bradley*, (3 *D. and E.* 145,) where the first estate was held to be a fee, and the limitation over an executory devise, the tenant in fee, believing that he took an estate tail, suffered a recovery and sold the land. But the court set aside the sale, because the limitation over was a good executory devise. The same rule will be found laid down in a number of other cases.—(*Pells vs. Brown*, *Cro. Jac.* 590. *Heath vs. Heath*, 1 *Bro.*

C. C. 148,) &c. And Mr. *Fearne*, in treating of the difference between a contingent remainder and an executory devise, states it to consist in this; "that the first may be barred by several different means; whereas it is a rule, that an executory devise, cannot be *prevented* or *destroyed*, by any alteration whatever in the estate, *out of which*, or *after which* it is limited." (*Fearne*, 306.) It may be said that an alienation may be good against the issue, although not against the executory devises. But the cases make no such distinction, and *Fearne* in another place says, "every executory devise, as far as it goes, creates a perpetuity; that is, an estate *unalienable* until *the contingency be determined* one way or another." (*Ibid.* 315.) But such a contingency cannot be determined till the death of the tenant in fee; for although he may have issue during his life, yet he may not *leave* any at his death, and therefore *during his life* the estate must be *unalienable*.

But it is not intended to insist on this ground, however strong it may be. The object of the present argument is to prevail by the strength of its own construction of the case, and not by the weakness of the opposite argument. I recur again then, to the construction, that the words, "should they (the grandsons) die, leaving no lawful issue," were intended to give the issue the intermediate estate: It is important here to remark, that even the general expressions "should they die without issue," which are understood to mean issue indefinitely, have been construed in most of the cases in which they have occurred to intend a distinct benefit for the issue, although there was no direct gift to them. As they could not, however, take as purchasers for want of a definite description, the court has implied, in those cases; an intention, "that the first taker should so take, that the property might be transmissible through him to his issue, and he was therefore, considered as taking an estate tail; which would descend on his issue." This is the language of Lord *Thurlow* in *Knight vs. Ellis*, (2 Bro. C. C. 578.) And the same principle is adopted in other cases. (*Cro. Ja.* 448. 1

P. W. 25. 2 *Vern.* 766. 1 *Eq. Ab.* 179. 3 *Ridge. P. C.* 365.)

But in the case before us, the words are *definite* with respect to the issue, and amount to a *direct gift* to them; as will be shown hereafter from the authorities which will be adduced. And yet it is denied in the opposite argument, that the testator intended for them any distinct benefit. They are supposed, (adopting the notion of Lord *Eldon*,) sufficiently provided for by his giving to their father an estate in fee, and to have been named by him for no other purpose than to raise a benefit to his distant relations. Can it be seriously believed that this was all that the testator had in view? Would he be so provident in preserving his "whole estate" for his distant relations on the failure of the issue, and yet leave the issue dependant on their father, who from caprice or partiality might give the whole to a wife or a favorite child, or who from misfortune or waste, might have nothing left to give?

But it has been insisted that the testator intended an absolute estate for his grandsons, because "he would be more solicitous to provide for such of his posterity as he knew, than for those who might never come into existence." This might be correct as a general presumption, but is certainly not so, where future objects are expressly had in view. For how often do we see testators giving to their children only a life estate in their property, and reserving the full enjoyment of it to the next descendants? We see indeed, in one extraordinary instance, (case of *Thelusson*, 4 *Ves.* 227,) a testator withdrawing the entire enjoyment of a vast estate from three generations of his family, in favor of remote objects, whom it may finally be difficult to ascertain. This solicitude to continue property in their families, is manifested by men of every condition in society; and if it is not carried further than the law allows, the indulgence of it to that extent, is perfectly consistent with the soundest policy. Property would lose a great part of its value in the eyes of most men, if it could not be thus disposed of. The pleasure

which the accumulation of it affords to many, seems to consist less in the enjoyment of it themselves, (for to some it does not bring a single comfort) than in the anticipation of the future ease and importance which they expect to confer by its means on their children and grand-children. This disposing power is obviously then an incitement to the industry of the country, and ought on that account to be favored to the extent of its legal boundary ; and in all doubtful questions, therefore, the courts should presume the legal exercise of it, instead of opposing to it artificial constructions, which almost always defeat the reasonable intention of the testator, and arbitrarily make for him a new will.

This view of the subject, if correct, must overturn the presumption that the testator, in the case before us, would only be solicitous to provide for his grandsons ; and it greatly strengthens the presumption that their issue were distinctly in his contemplation. It is manifest that he was one of those who wished to keep his estate in his family as long as he could, for he expressly provides that “ the whole shall be preserved *for his distant relations*, if there should be no issue. Must he not then have intended that *the whole should be preserved for the issue*, if there were any, who would be his own descendants? Both nature and reason call for this presumption, and in order to carry it into effect, we must construe the will to give an estate by *necessary implication* to the grandsons *for life* only, and the remainder to the issue as *purchasers*.

Here we have to encounter an objection, which seems to be considered as insuperable on the opposite side. It is insisted that “ an estate can never be *implied* to issue as *purchasers* ;” and the rule is so laid down by Mr. *Fonblanque*, (2 vol. 63,) who rests it chiefly on the authority of *Lanesborough v. Fox*, (Ca. tem. Talb. 262,) and *Bodens vs. Watson*, (Amb. 478.) When these cases, however, are fully examined, it will be found that they do not authorize the rule to the unqualified extent in which *Fonblanque* had laid it down ; and it is clearly

not authorized by the original decisions on the subject.— It will be shown also that the rule could not apply to a case like this, even in the English Courts ; and that it never can apply in its feudal sense, (which is the one here insisted on) to any case arising in this court.

The case of *Lanesborough vs. Fox*, was briefly this.— A. devised his right of reversion in certain lands contained in a settlement, “ *on failure of issue of the body of his son B.*” to his daughter F. and the heirs of her body. It was adjudged in the House of Lords that these words did not give an estate tail by implication to B. and the devise to F. was void, as being on too remote a contingency, (*Ca. tem. Talb.* 262.) Mr. *Fearne*, in commenting on this case, assigns as the reason for the decision, that there was no subsisting estate in A. extending to the issue of B. and therefore the estate devised by A. could not be considered as the devise of a reversion depending on such preceding estate, (*Fearne*, 326.) It appears from this that the intention could not have effect, because there was nothing on which it could operate, and not because it contravened the rule now insisted on. How then does this case support the rule, or how does it control the general rule of intention ?

So in the case of *Bodens vs. Watson*, the testatrix directed her estate to be sold and laid out in the funds for the plaintiff during his life, and “ *if he had no heirs*” to the defendant. The question was whether the devise over was too remote, being after a dying without heirs generally ? This was clearly a question of technical construction, and Lord *Northington* so considered it. “ *I cannot*” says he, “ *imply a gift to the issue as purchasers*, for such an implication must be *necessary*, which is not the case here.”

And again, “ *the failure of heirs is not confined to a particular time, but is general.*” This is saying expressly that a *necessary implication* would be sufficient to raise a gift to the issue as purchasers ; and Lord *Hardwicke* had before determined, in the case of *Read vs. Snell*, (*2 Atk.*

§46,) (which will be more fully noticed hereafter,) that the word *leaving* as applied to issue, was a word of *purchase*, and would raise an estate in remainder by *necessary implication*. What then becomes of the supposed inflexible rule to the contrary?

But I proceed to show that it is not authorized by the original decisions on the subject.

The earliest case referred to is in the year book of 13 H. 7, which is thus stated by *Plowden*:—"If a man devises land to one, habendum to him and to his heirs, *after the death of the wife of the devisor*, then although the wife is not named, yet she shall take an estate for life thereby," (*Plowd. Com.* 158.) The editor of *Plowden* undertakes to correct this statement, and insists that the case in 13 H. 7, was not a devise to a *stranger*, but to the *heir at law*, after the death of the wife, which he agrees carries an estate for life to the wife by necessary implication, because the heir is expressly excluded from taking it until after her death. But the same rule is again recognized by *Plowden*, in a subsequent part of his Commentaries.—"If says he, one devises land to a man after the death of his wife, the wife shall have an estate for life, although it be not given to her, and this is by reason of the *intent*, (*Plow. Com.* 414.) Now, although the case in 13 H. 7, may have been a devise to the heir, yet it does not follow that the rule was not applicable to a stranger also; and surely *Plowden*, who ranked with *Littleton* and *Coke* as an oracle of ancient law, ought to know better what that law was than any modern lawyer.*

I think it must appear from this examination that the rule which has been so strongly relied on, is as much under the control of intention as any other rule, and is made to yield even in the English Courts to words of necessary

NOTE BY MR. KING.

* Professor *Christian*, in his notes on 2 *Black. Com.* 381, says—"It has been thought that if it is given to a stranger, &c. &c." This shows the inclination of his own opinion to be in favor of the above construction of *Plowden*.

implication. But the operation of it in our courts must be still more limited for another reason. Its chief object is avowedly to protect the interest of the heir at law, who has always been so great a favorite with the law of England, that almost all the technical obstacles opposed to intention, seem to have been created for his benefit.—He is there the representative of family pride, and the depositary of a name and estate which it is the policy of an aristocratic government to preserve in perpetual existence; and therefore every presumption is made in his favor. But here we have *no heir at law*. A more just policy, and one more suited to our republican institutions, has long ago abolished the un-natural claims of primogeniture. Real estate is here no longer transmissible by *descent*; the act declares that there shall be an equitable *distribution* of it, and it is placed on the same footing as personal estate. Every rule, therefore, incident to the right of primogeniture, must, as far as it relates to that right, be necessarily modified; and the rule under consideration can only be recognized in our courts, after being divested of this feudal principle. It must then sink into the rule which has been applied to devises where the interest of the heir was not concerned; as where the devise has been of a term, or any other personal estate. It must be obvious for the same reason that the distinction which prevails in the English cases, in the construction of the words “leaving no issue,” with a reference to real or personal estate, cannot exist here. Lord *Kenyon* has denied the existence of it even in England. “It would be very strange,” says he, “if these words had a different meaning when applied to real and personal property. If such a distinction existed in the law, it certainly would not agree with the rule *lex plus laudatur, quando ratione probatur*; but it is not founded in law.” (3 *D. & E.* 146.) Lord *Eldon* has indeed expressed great alarm at this opinion, and considers it an outrage on a settled rule. (*Crooke vs. De Vandes*, 9 *Ves.* 203.) But it is unimportant to us what the rule may be in England; it is sufficient for

our purpose that this distinction is untenable in our courts, and it may be left to the English Judges to settle the question in their own way.

There remains one more objection to be considered.—Great stress has been laid on the devise to the grandsons being an estate in fee, which is supposed to preclude any implication to the contrary. This objection has been partly answered by the cases already cited, and particularly by that of *Robinson vs. Robinson*, in which all the Judges of the King's Bench concurred in construing an express estate for life, to be an estate tail, in order to *effectuate the intention*.

The case of *Porter vs. Bradley*, (3 D. & E. 145,) is another strong case, in which Lord *Kenyon* thus lays down the law—"the first part of the devise carries a *fee*, for it is to him, *his heirs and assigns for ever*; but it is clear that those words may be restrained by subsequent ones, so as to carry only an estate tail."

In *Bean vs. Halley*, (8 T. Rep. 8,) Lord *Kenyon* is still more full on the point. "I will not (says he) go through all the cases on this head, because they were examined most minutely in that of *Robinson vs. Robinson*, which was sifted and considered more than any preceding case.

That case was agitated for nearly half a century. It first came on in Sir *J. Jekyll's* time, and was not decided until after Lord *Hardwicke* had left the profession; and though the latter entertained some doubts during its discussion in the House of Lords, (he had, it appears, given a contrary opinion in the Court of Chancery,) he concurred in the unanimous opinion of the Judges, delivered by *C. Baron Parker*. By that case, this position is clearly established, that in the construction of a will, we must first look to the *general intent* of the deviser, and give effect to that; and if there be a secondary intent which interferes with it, we are to reconcile the whole as far as we can, but *at all events, to give effect to the general intention*.

In that case the special intent was defeated; the first limitation was to L. H. *for life and no longer*; nothing therefore could be more clear than that the devisor only intended to give him an estate for life; yet seeing that that particular intent was inconsistent with the devisor's general intent, which was that the whole line of male heirs of L. H. should take, the court thought that they ought, in convenience and in law, to effectuate that general intent." So in the case before us, it may be admitted that *W. Wilson* intended to give an estate in fee to his grandsons; but he intended also that his estate should go afterwards to their issue, and if not, to collateral relations. As an absolute estate to the grandsons would be inconsistent with this general intent, we are bound to construe the devise to them an estate *for life only*, in order to carry into effect such general intent. Mr. *Just. Ashhurst* in concurring with Lord K. in the above case, observed "that the cases of *Robinson vs. Robinson*, and *Barnfield vs. Popham*, had brought back the rule of law to its natural channel, namely, the general intention of the testator, and freed it from the fetters of technical rules."

I have so far considered the will under examination on its own independent ground of intention, which, according to the principles before laid down, is the true ground on which it ought to be determined; but as the construction we contend for is also fully supported by precedents, and it may be a further satisfaction to shew this, I will refer to some of those which most directly apply to it. In *Forth vs. Chapman*, (1 P. Wms. 667,) the words were (after giving the estate to the first taker without the words *for life*) "and if my said nephew shall depart this life, and leave no issue of his body," then a devise over.—Lord *Macclesfield* was of opinion that the words were *descriptive* of issue at the time of the death of the nephew, and the devise over was good. This was saying, in other words, that the issue, if any, would have taken as *purchasers*. I quote this case from 2 *Atk.* 647, as it is there

stated by Lord *Hardwicke*, who says he took it from his own note of the case, having been counsel in it.

Again, in *Read vs. Snell*, (2 *Atk.* 642,) the testatrix left her whole estate to be settled on her daughter and the heirs of her body, and adds, “but in case my said daughter should die, *leaving no heirs of her body*, then I bequeath over, &c. Lord *Hardwicke* said, “I am of opinion that this is a gift to the daughter *for life*, with a *contingent remainder* to such heir of her body as shall be *living at the time of her death*. There have been many cases where heirs of the body have been construed words of purchase.” “It has been objected, that the words *for life* are not in this will. But I do not know that any weight has been laid on the want of those words when the intention of the testator has otherwise appeared.”—(*Ibid*, 648.)

So in *Lamply vs. Blower*, (3 *Atk.* 397,) the testatrix gave by her will to her two nieces, “each one half of the produce of bank stock, and *to their issue*, and if either of them should happen to die before the legacy became due, and *leave no issue*, the share of her, so dying, should go to the survivor.” One of the nieces died, leaving a son, who brought his bill for the moiety of the Bank Stock.—It was objected on the other side, that there was no bequest to the ancestor *for life*, and therefore the issue could not take by way of *remainder*. But Lord *Hardwicke* again recognized the settled rule, that the words “*leave no issue*” were relative to any child which the legatee might have at the time of her death; and although the preceding gift was to the mother and her issue indefinitely, which would vest the whole interest in the mother, yet it was said the subsequent words showed that the issue were to take after the mother, and the court decreed for the plaintiff accordingly.

These cases confirm, most explicitly, every ground which has been contended for. They recognize the rule of intention as the *paramount rule*. They concur in construing the words “*leaving no issue*,” as words of

purchase. They declare that these words are such a personal designation of the issue as to amount to a *direct gift* to them. And lastly, although there may be *no preceding estate for life*, or although there may be an *express estate in fee*, or in tail, to the first taker; yet, in order to effectuate the intention, these words will raise, by *necessary implication*, an *estate for life* to their first taker, and a *contingent remainder* to the issue.

I here close the argument. This united authority of precedents and principles, in support of the construction given by this court to the will of *W. Wilson*, ought I think to be conclusive. It would, however, be presuming too much to expect that it will satisfy every judgment. The bias produced even in liberal minds, by opinions previously formed or professionally adopted, forbids such an expectation. But it is believed that it will satisfy the candid and enlightened judgments of those who have no such prepossessions; and it is confidently hoped that it will afford a sufficient refutation of the charge contained in one of the grounds of appeal, "that the jurisdiction which has been exercised by the court is an unwarranted assumption of power." It is the license of the bar, and perhaps it is their privilege, if exercised with decorum, to arraign such decisions of the bench as appear to depart from any fundamental principle. But an apparent departure may, when more fully examined, prove to be an authorized act; and especially where the question relates to the application, as in the present case of the ancient law of England to the tenures of this country. Our ancestors in adopting the common law, expressly excepted such parts of it as were inconsistent with our peculiar institutions; and as such a discrimination was not easily susceptible of Legislative regulation, they must have intended that this should be left to the sound discretion of the courts. In England, the modifications, which the ancient law has been continually undergoing by judicial decisions, have, in the lapse of time, so changed the original system, that

the sages of two centuries ago would not, if now alive, recognize it as the same.

Such modifications are rendered necessary by the progressive changes in the moral and political state of society; and if they are so gradual as to give no alarm to the jealousy of the profession, by rendering legal advice uncertain, they must be justly considered as safe and necessary improvements in jurisprudence. But there cannot be a greater public mischief, and one more to be deprecated than an abrupt judicial change in a settled rule of law; for this must subvert existing rights, and would be legislation in its worst form. So any unwarranted interference with the jurisdiction of another court, by assuming its powers, or opposing its authority, must also have the most mischievous tendency. It is not believed, however, that it is seriously intended to impute either of these acts to this court. The animadversions of the bar, on particular decisions, will often be indulged to great extent, both in argument and in conversation; but a cooler exercise of judgment, and a more perfect examination, would not, I am persuaded, permit any member of it, who possessed a full knowledge of the legitimate powers of this court, to make a deliberate charge of this nature.

Chancellor *De Saussure* :

I have examined the above opinion with much attention; I am entirely satisfied with the reasoning and conclusions, and I concur therein fully.

Chancellor *James* : I concur.

Chancellor *Gaillard* :

The decree of the Circuit Court is appealed from on different grounds :

1st. That the court assumed a jurisdiction not warranted by the laws of the land, in taking cognizance of the above case, because there was plain and adequate remedy for the complainants at law.

2d. That the court assumed a jurisdiction not warranted by the previous usage of the same court in trying the validity of a title of a freehold between adverse claimants.

3d. That the court proceeded to decree upon the face of the bill, when not an argument of counsel was made on either side beyond the legal grounds contained in the demurrer, and without hearing testimony on either side, and assuming the allegations contained in the bill as true, which were expressly negatived in the answer.

4th. The courts violated the constitution by taking jurisdiction of a case properly cognizable by a jury, and where a jury is guaranteed by the constitution.

5th. That the court misapprehended its duty and powers, when it endeavoured by an over-reached authority, to counteract the legal determinations of the court of law.

6th. That the court was without the pale of its authority in looking to the event of a decision not made by the Court of Law, nor made until eleven months and more after hearing of the above case.

7th. Because the decision is, in every part, against law, usage, facts and prerogatives, and in direct violation of the constitution.

I concur in the opinion expressed as to the intention of the testator. On this point I shall add nothing, except to observe that the court will go every length possible to carry the intention of a testator into execution for the benefit of those to whom the testator designed a benefit, (*2 Fearne*, p. 177.) A bequest is made to A. and if A. dies without issue, then to B.; the limitation over is void.— But if to A. and A. dies without leaving issue, it is good, although in both cases the intention is probably the same. I should construe the bequest differently, considering myself bound by the technical construction of the words dying without issue. But as Lord *Thurlow* observes, to call dying without leaving issue, the natural sense of dying without issue, is against all the cases; the word leaving, restricts the dying without issue indefinitely, to dying without issue living at the death of the testator, and

brings the limitation within the period during which it is permitted to suspend the power of alienation. The son of *Thomas Wilson*, (the grandson of the testator,) taking a fee by implication, it follows that his father, by exchanging the Black River for the Boggy Swamp plantation, parted with a greater interest than he was entitled to.— Now it is not allowed to a tenant for life to take advantage of his possession, to injure the estate of the remainder man. An Equity grows out of the relation in which he is placed. He who purchases from a trustee, with a knowledge of the trust, takes subject to it. The defendant *Green* ran the risk of a bad title, and guarded against it. He does not deny in his answer that “he used such caution in obtaining a security for his title, that a prudent man would use.” The bill is brought to set aside the agreement between *Thomas Wilson*, the grandson, and the defendant *Green*, to compel him to re-convey the Black River plantation, to account for the profits of it, and also to deliver up the muniments and titles of the estate. To set aside an agreement, and compel a re-conveyance is a matter within the ordinary exercise of the jurisdiction of this court, nor can it be denied that the court has jurisdiction on equitable ground to order instruments to be delivered up; and Lord *Eldon* in *Ware & Harewood*, (14 *Vesey*, p. 32,) says, “if those grounds involve the consideration of legal points arising incidentally in the exercise of that equitable jurisdiction, and in general, where the court has the equitable jurisdiction, it has a clear right to decide for itself the questions arising incidentally with a view to determine the principal question, so much so that this court, in such cases, is not even bound to act upon the answer given to it by a court of law.” Without the equitable grounds which give this court jurisdiction, so far from the remedy being complete and adequate at law, the complainant would have been obliged in order to make out his case, to resort to this court to procure the papers improperly in the hands of the defendant, and sought by the bill. In reference to another of the grounds

of appeal, it is to be observed, that the first construction which the will of *Wilson* received, was given by this court. If the court of law had given their construction first, I should have adopted it on account of the great importance of preserving an uniformity of decisions. This court has no control nor supremacy over the court of law. The mode of calculating interest in the two courts is, in some cases, different; the courts of law, allowing what this court considers as compound interest; but it does not counteract the legal determinations of that court, nor interfere with their executions issued in conformity to their own decisions. Evils, it is admitted, result from the occasional differences of opinion of the two courts, but it is believed they spring from a defect in the organization of our judiciary system, and not from its administration.— The answer of the defendant was read in the Circuit Court, and the defendant had the benefit of it. The decree is founded altogether on the construction of the will, and on allegations in the bill which the answer admits. I concur therefore in the opinion of my brethren, as well as to the jurisdiction of the court as to the intention of the testator, and that the decree of the Circuit Court should be affirmed.

November 5, 1822.

Decree of the Appeal Court entered in this case, Columbia, May, 1822.

It is ordered and adjudged that the decree of the Circuit Court be affirmed.

(Signed)

HENRY W. DE SAUSSURE,
THEODORE GAILLARD,
THO. WATIES,
WM. D. JAMES.

Prioleau & Wilson, for the motion.

King, contra.

WILLIAM DEWEES vs. ADGER & BLACK.

A vessel floating in the dock of any wharf, though moored to a different wharf, must be considered as laying at the former wharf; and the rates of wharfage due by her, must go to that wharf.

TRIED before Mr. Justice *Richardson*.—This was a summary process to recover rates of wharfage. The particular charge made was for landing, that is, in the language of the act of 28th March, 1773, (*P. L.* 295,) “for goods laden from one vessel to another.” The defendant’s schooner lay in the dock or space of water, opposite to the plaintiffs wharf, and had her cargo landed or laden on board a ship, which lay in the dock of Magwood’s wharf: both the ship and schooner were moored to Magwood’s wharf. Judge *Richardson*, who presided, ordered the “rates for landing” to be paid to the plaintiff, and this appeal was on the ground that the plaintiff was not entitled to landing, from the schooner.

Mr. Justice *Richardson* delivered the opinion of the court:

The proper inquiry is, at whose wharf did the schooner lay, i. e. does the floating in the plaintiff’s dock or the mooring to Magwood’s wharf, give the right to the rates of wharfage? The language of the act in fixing the rates of wharfage is not explicit. The first class of rates is called “wharfage of ships, &c. for each day that such vessel shall lay at any wharf.” What position is meant, by “laying at a wharf,” is left to construction. Custom has heretofore, as I understand, allowed the wharfage for laying at a wharf, to that wharf, in the dock of which the vessel floats, although she may be moored to a different wharf. Five witnesses, Mr. *Crawford*, *Gibbs*, *Lothrop*, *Ingraham* and *Butler* agreed in this, and thought that the charge for landing would follow that for layage. Mr. *Ingraham* mentioned an instance of \$700 rent being paid by *Chislom* to *Doyley* for the use of his dock, adjoining

Chislom's wharf. But Mr. *Payne* thought that no right to wharfage of any kind could accrue to the plaintiff; but that the rates ought to go to the wharf, at which, the schooner had been moored. He conceived that the mere use of the dock gave no claim, because the dock, as he supposed, belongs to the state. I will not affect to decide in whom the fee simple of the dock is vested. For the present, it suffices to say, that the act of 1778 allows the rates of wharfage; and the right to the use of the dock is presupposed, in order to authorize the charge of such rates, by any person. But if the docks were common to all the wharves, the indiscriminate use of them would be productive of endless contention, partialities and injustice. On the other hand, in whomsoever the fee simple may be, the custom is plain, reasonable and consistent with the essential characteristics of the rates of wharfage, to allow to each wharf the use of the water directly in front; and to consider such water, (at least for the purpose of enforcing the act and allowing the rates,) as part of the wharf. The moment this space of water, called the dock, is thus appropriated to its proper wharf, it follows, that a vessel floating in the dock of any wharf, though moored to a different wharf, must be considered as laying at the former wharf; and the rates of wharfage due by her, must go to that wharf. In a word, *layage* gives the rates of wharfage. For instance, if goods laying on a wharf should be taken from such wharf by water, the wharf so discharging the goods, receives the rates. This arises under that class of rates called "wharfage of goods loaded at, or taken from any wharf by water." (*P. L.* 295.) So the charge for landing in the instance before us, comes under that class of rates, called "wharfage of goods landed or laden from one vessel to another at any wharf." (*P. L.* 294.) Here must be meant the rates to be paid by the vessel which unloads, not that which receives the goods. Now in the present instance, the schooner did unload and discharge the goods, and she lay at the time in the dock, which is the same as at the wharf of the plaintiff. The

plaintiff's wharf, then, received the schooner with her cargo, and from his wharf the cargo was discharged. The schooner, for the purpose of landing the goods, being at the wharf from which the goods were taken in the former instance: That is to say, as she lay at the plaintiff's wharf, she was for that purpose as part of his wharf. It follows, as in the former instance, that the wharf which had received, and does discharge the goods, is entitled to the rates of wharfage.

The motion is therefore dismissed.

Justices *Colcock, Nott, Huger* and *Johnson*, concurred.

Hayne, At'y. Gen. for the motion.

Simons, contra.

JAMES STEVENS, *ads.* TREASURERS.

The act of 1795, requires Sheriffs to give bond to the "Treasurers of the state," *Held*, that a bond to the "commissioners of the Treasury" is good.

So where the same act requires that before the Sheriff's bond is accepted by the Treasurer, it shall be approved of by 3 commissioners, but the same was only approved of by 2: It was *Held*, that as long as the Sheriff remained in office, he must be regarded as an officer, and his own failure to perfect his security can not be pleaded in bar against the consequences of his misconduct in office.

So of the certificate required by the above act from the Treasury, and to be recorded in the clerk's office of the district, the Sheriff can not object that it has never been obtained.

So it is not objectionable on the part of the Sheriff, that his bond was for \$10,000, and the act required it to be for \$5,000.

Tried before Mr. Justice *Richardson*, at Colleton, November Term, 1822.

THIS was an action of debt against the defendant as security in the official bond of *Berkly Ferguson*, late sheriff of Beaufort district.

The defendant pleaded in bar, viz: 1st. That the Act of Assembly of 1795, regulating the office of sheriff, required the sheriff's bond to be made payable to the "Treasurers of the state," whereas, the bond in question, was made payable to the Commissioners of the Treasury.

2nd. That the said act required that the securities to the said bond, before they were accepted by the treasurers, should be approved of by certain commissioners, or any three of them, or the office of the sheriff should be vacated; whereas, the securities of this bond were approved of but by 2 commissioners.

3rd. That the said act required, that the sheriff should not enter on the duties of his office, until he had recorded in the office of the clerk of the District Court, for which he was elected, a certificate from the said commissioners, that the sheriff had duly executed and lodged in the treasury, such bond with such security as was required by the Act of Assembly; and if the sheriff should fail to comply with these requisites, the office of such sheriff should be vacated; Whereas, no such certificate required by the Act of Assembly, was ever recorded in the office of the clerk of common pleas of Beaufort district.

4th. That by Act of Assembly of 1799, the bond required from the sheriff of Beaufort district, was directed to be for the sum of \$ 5,000; whereas the bond given by the said sheriff and his securities, was for the sum of \$ 10,000.

The plaintiff demurred to this plea, and the defendant joined in the demurrer. The presiding Judge sustained the demurrer, and overruled the plea.

From this decision, an appeal was made, and a motion now made for the reversal of the decision of the Circuit Court, upon the grounds set forth in the said plea.

Mr. Justice *Richardson* delivered the opinion of the court:

The object of the act of 1795, was to obtain security from sheriffs, and for that purpose it points out certain

means by which the security shall be ascertained to be good and sufficient. When the act directs the sheriff's bond to be made payable to the treasurers of the state, it can mean no other officers than those called in the constitution, Art. 5th, "the commissioners of the treasury." In art. 10th, "treasurers," and it is immaterial whether they are described by the one name or the other. We are to regard the meaning of the act, when not inconsistent with the plain, literal import of the words used.

2dly. Again, when the act declares, that before the bond is accepted by the treasurers, it shall have been approved by three commissioners, it can mean no more than to lay down a rule of action to be practised before the treasurers shall accept the bond. The injunction is merely directory, and though the total neglect might possibly have afforded a ground for declaring the sheriff's office vacated, still as long as he remained in office, he must be regarded as an officer, and his own failure to perfect his security cannot be pleaded in bar against the consequence of his misconduct, in not discharging his official duties. It was for him to provide and to perfect his security, as the act requires expressly of him, (*1 Faust, p. 7.*)

The same observation is a sufficient answer to the third ground taken. It was the duty of the sheriff to have recorded in the clerk's office, the certificate of the commissioners. This also is required of him by the act, (*see 2 Faust, p. 8,*) and if he did not do so, neither he nor the securities can take advantage of his wrongful neglect.— They are still bound by their bond, which was given on their part, and accepted by the treasurers. The end in view was to obtain security by bond for the officer: and such a bond as the treasurers have accepted must have been given, and become a binding contract. The approval by the commissioners, the certificate, recording, &c. are, besides, no more than the mere modes of giving, examining and perpetuating the bond. These are not of the essence, and constitute no part of the obligation of the contract.— The last ground, that the bond is for \$10,000, when the

act directs it to be given for \$ 5,000, I should have deemed worthy of great consideration, but for a decision of this court in the case of the Treasurers vs. the Securities of *William Davis*, sheriff of Camden. In that case, the securities were held liable, though the bond of sheriff *Davis*, varied by \$ ——— from the sum required by the act. And when we reflect that the bond and security ; the approval ; the certificate and recording, are all proved and done by the sheriff after his election, and before he shall enter upon his office ;—that these are all acts required strictly of him in order to ensure his fidelity, we cannot but foresee the great danger of permitting him or his security, deriving advantage from any error or omission, either in the bond or in the manner of giving or recording it.

The motion is therefore discharged.

Justices *Bay, Nott, Huger, Gantt* and *Johnson*, concurred.

DeSaussure, for the motion.

Petigru, contra.



THE STATE vs. WILLIAM APPLGATE.

A magistrate cannot commit a constable for a contempt in not returning an execution, and paying the money collected on the same. Indeed, it seems he can only imprison for contempts committed in the face of his court.

THIS was a motion for a *habeas corpus*, before Judge *Richardson*.

Mr. *J. B. White*, as justice of the quorum, in two cases tried before him, the one *John Smith vs. D. Cregier* ; the other *Street & Starke vs. D. Cregier*, decreed for the plaintiffs to the amount of \$ 16 6-100. On the 13th of August, 1821, he issued executions which were placed on that day in the hands of *William Applegate*, a state con-

stable, to be levied. But *Applegate* making no return of the executions, the Justice, on the 6th of October, issued a rule requiring him to do so, or to shew cause why an attachment should not issue against him as for a contempt of the court. On the return of the rule, *Applegate* stated that he had levied to the amount of \$16 25-100, but had applied the money to the payment of a debt of his own, said to be recovered against said *Cregier* before Justice *Marshall*, on the 19th June, 1821. That on the 20th August, on the day the sale under the said execution took place, he had taken out an execution from Justice *Marshall*, which he put into the hands of *John Helfrid*, jun. and applied the money to that execution. Upon this statement, Mr. *White* determined that the two executions issued out of his office were entitled to priority in law, not only as being those on which the money was actually raised, but also as being first lodged in the hands of an executive officer, and ordered the said *Applegate* to pay over the money, which he refused to do, whereupon an attachment issued. *Applegate* was brought before Judge *Richardson* by *habeas corpus*, and a motion made for his discharge. After argument, the prisoner was discharged, on the ground that there was no express authority by the laws of the state to authorize the commitment, and that precedent was wanting to support it. It is therefore submitted that his Honor erred in discharging the said constable, and a motion was now made to reverse that decision.

Mr. Justice *Richardson* delivered the opinion of the court:

Although justices of the peace have judicial power, yet they possess a very inferior jurisdiction. *Comyns* says, (*p.* 501, 4 *vol.*) their authority is to be exercised, *secundum vim, formam et effectum statuti*, and are confined to offences named in their commission. Whatever be the power or privilege exercised by them, must appear to be authorized either by former precedents, which presuppose a grant of power by positive enactment, or else must be

incident to their office. Now there has not been adduced an instance of a justice of the peace having committed a constable or other officer for a contempt committed out of the presence of the Justices' court. The doctrine adduced from 1 *Bacon*, 180, as authorizing it, does not warrant such a conclusion, and so far from the Legislature having expressly given such a power, in the act of 1794, (1 *Brevard*, 472, sec. 66,) they seem to have denied to Justices the power of committing for contempts, even in the presence of the court, by enacting, that witnesses who refuse to attend a Justices' court, or who, when attending, refuse to testify, may be attached, not by the Justice, but by a superior court upon proper application.

Lastly. Is the power of committing incident to the Justices' office ? i. e. Is such power essentially necessary to the convenient discharge of his duties ?

To commit for a contempt done in the face of a court is essential to preserve the order necessary for the convenient discharge of business. Such a power is incident to all judicial tribunals, (1 *Bacon*, 108. 8 *Coke*, 38. *Cro. Eliz.* 581. *Rolls. abr.* 219. *Sid.* 145.) But to commit for a contempt done out of court, is in no respect necessary for the discharge of the Justices' duties. Such a power is perhaps the greatest prerogative allowed to courts of the highest jurisdiction, and how inconsistent would the practice of this prerogative be in the hands of a justice, when we consider that even after a regular judgment given, a justice of the peace cannot take the body of a defendant, nor levy upon his lands, and can issue execution against his goods and chattels only. (*P. L.* 213.) This is all the Justice could have done in the case before us, had judgment been first rendered against *Applegate* for the money received by him.

The motion is therefore dismissed.

Justices *Bay*, *Colcock*, *Nott* and *Johnson*, concurred.

Hayne, Att'y. Gen. and *J. B. White*, for the motion.
Furman, contra.

DON ANTONIO DE AREOS *vs.* THE SO. CA. INSURANCE
COMPANY.

Where the facts relied on to prove a deviation in a voyage from the policy were unsatisfactory, the court granted a new trial for a more complete investigation.

Tried before his honor Judge *Johnson*, in Charleston,
May Term, 1821.

THIS was an action of assumpsit to recover for a total loss on a policy of insurance on goods for the schooner *La Carmen*, Captain *Martelo*, from Havana to Charleston. The plaintiff proved the policy, which bore date December 27, 1816, and was for \$6,500, also his interest on the property on board. He then adduced the protest, which set forth that the schooner sailed from Havana on her intended voyage, the 25th December, 1816, with her said cargo, the property of the plaintiff, and proceeded with light and variable breezes and a strong current to leeward : that at 9 o'clock, A. M. on the 4th January, in latitude 24° 45' and longitude 74° 20' meridian of Cadiz, they descried a sail to windward, which bore down on the schooner, and chased her until 2 o'clock, and then captured her : that the capturing vessel proved to be a Carthaginian privateer, who took out the officers, and all the crew of the schooner and put them on board the privateer. On the 12th, the captors landed captain *Martelo* and his pilot ashore, between Puerto Escondido and Jamco, whence they proceeded to Matanzas, and upon their arrival there, made their protest on the 17th, which was renewed at Havana. The *La Carmen*, her papers and crew were all carried off, and the plaintiff having proved his abandonment, claimed for a total loss, which by the brokers statement, not disputed, amounted to \$6370, with interest from March 4th, 1817, when the demand was made.

The defence set up was wilful delay on the voyage, amounting to deviation. To prove which, the defendants examined *Sears Hubbel*, captain of the schooner *Martha*,

who deposed that he sailed from the Havana, on the 2d January, 1817, with wind to the East and N. East ; that the wind continued favorable, and that he arrived at Charleston on the 7th, after five days passage : that he did not find the current deviate from the usual set and velocity : that his answers were from the log book of the *Martha*, and he believed were correct.

The next witness was *John Baker*, captain of the schooner *Eliza Ann*, who deposed, that he was in the Havana in December, 1816, and sailed thence, on the 25th same month for Charleston ; that he arrived safe in Charleston, after a passage of 11 days ; that he was not obstructed by adverse or unusual currents ; that the winds were strong on the day she left Havana ; for in the evening he had to heave to, and continued so during the whole passage. Whilst in Havana, there were American vessels offering for freight to Charleston, cheaper than on board Spanish vessels.

The defendant here closed, and the plaintiff read the examination of *Dow Acebal* of Havana, taken on commission, and who testified that he knew the plaintiff to be a Spaniard, and a merchant of respectability and good character.

Here the testimony closed, and the defendants counsel then contended, that as the *La Carmen* sailed on the 25th and was captured on the 4th, at no great distance from the port whence she sailed, her delay was to be presumed voluntary and fraudulent, and therefore amounted to a deviation.

The plaintiffs counsel then objected, on the other side, that there was no proof of voluntary delay, but just the reverse, for the vessel had light winds and adverse currents, and it did not follow, that because another vessel, which sailed the same day made the voyage in 11 days, that the *La Carmen* might have done the same thing. He contended that deviation was a question of law and of fact.

The presiding judge, after defining what the law meant by a deviation, and stating its consequences, left it to the jury to decide whether the facts proved, amounted to a

wilful delay, and if so, they were to find for the defendants, which they accordingly did.

A motion was now made to set aside the verdict and for a new trial, on the ground that the verdict for the defendants was not only unsupported by any evidence, but in direct opposition to the evidence given in the case, which was fully sufficient to enable the plaintiff to recover.

Mr. Justice *Richardson* delivered the opinion of the court :

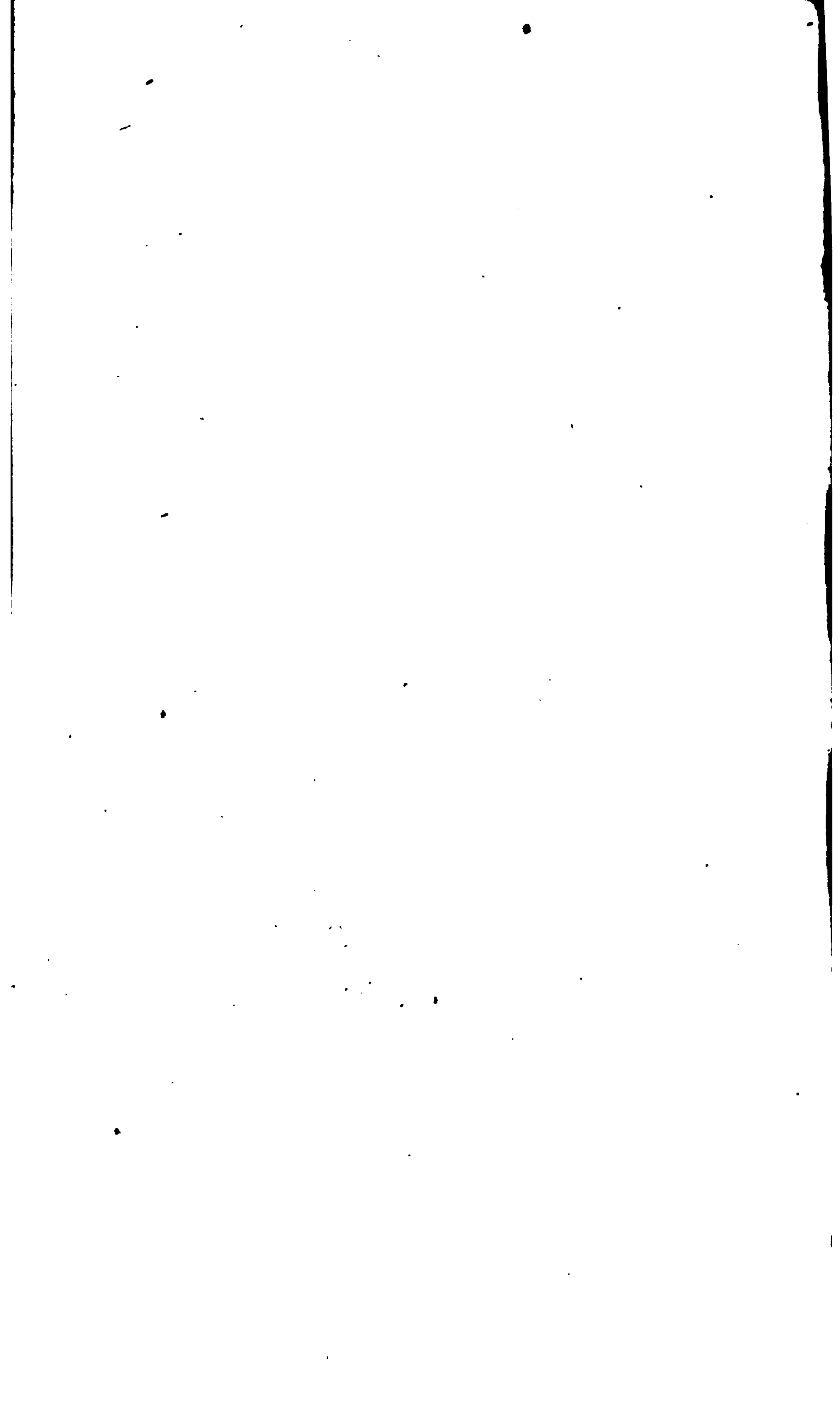
I am of opinion that a new trial should be granted, in order that the charge of a wilful delay in the voyage may be further enquired into, and the case reconsidered, inasmuch as the testimony was unsatisfactory upon that point, and therefore I deem it worthy of a second investigation before a jury.

Justices *Huger*, *Gantt* and *Johnson*, concurred.

Colcock, Justice, dissented.

Prioleau, for the motion.

Ford, contra.



CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, MAY TERM, 1822—CHARLESTON.

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	RICHARD GANTT,
ABRAHAM NOTT,	DAVID JOHNSON,
CHARLES J. COLCOCK,	JOHN S. RICHARDSON,
DANIEL ELLIOTT HUGER.	

THE STATE vs. JOSEPH COLE, TURNER V. DAUNER, and
WM. GASKINS.

If persons who have assembled for a lawful purpose do afterwards associate together to commit an unlawful act, such association will be considered an assembling together for that purpose: So three or more patrolling may commit a riot.

The captain of a beat company cannot constitute himself the captain of patrol.

Where an act imposes a penalty, and points out the manner by which that penalty shall be recovered, that method, and that only, must be pursued.

CHARLESTON Spring Term, 1822.—Tried before
Mr. Justice *Nott*.

The defendants in this case were indicted for a riot.—The prosecutor, Captain *William Cattell*, swore that on the night of the 11th, or rather about 1 o'clock on the morning of the 12th of January, 1821, he was roused from his sleep by the report of a gun. Immediately after he heard another; he next heard one of his servants running round the house, enquiring if he was awake. He got up, and before he could get his clothes on, his driver called him. He went out, and on his way to his negro houses, he met Capt. *Cole*, one of the defendants, who was abus-

ing one of his negro women. She was complaining that he had beaten her. The witness asked *Cole* what he was doing, he said he was patrolling. Witness replied it was very well, and asked him why he had beaten the negro woman. He said on account of her insolence. One of his fellows then came up and said he had struck him in the face with the butt of his gun. *Cole* at first denied it; he afterwards acknowledged that he had beaten him in the manner the negro had related, and said he had done it because he had refused to obey his orders. He then asked him why they had fired the guns; he said they had been shooting dogs. *Cole* then advanced towards him brandishing his gun in a very angry manner, and using some threatening language. About this time the two other defendants came out of the negro houses armed with guns and sabres. They were desired to do their duty, and witness went along with them to the negro houses. The first they came to was locked, and the owner from home; he broke the house open and let them examine it. *Cole* did not get off of his horse all this time; the other two were on foot. *Cole* then began abusing him; told him his negroes were a nuisance to the parish; that he was a damned mean fellow; that he had supported his negroes in killing his hogs. He again abused him as before; called him a mean man; accused him of having his hogs killed, burning his fences, &c. The prosecutor said that several of his dogs were shot, and cut to pieces with their sabres. The negro woman had been beaten with a sabre. He was asked why he supposed they had come for the purpose of committing a riot and not to patrol. He said, because he understood they had gone no where else after they left his house. They had been at Mr. *Pringle's* before. *Cole* had frequently been at his plantation before, and committed similar outrages under pretence of patrolling. He knew *Cole* to be the captain of a beat company, and had been for several years. The other two defendants did not say any thing, but appeared by their conduct to be acting in concert with him. *Gaskins* as-

knownedged that he had killed the dogs. Witness saw them thrusting their swords through the floor where some dogs were, and he saw his dogs the next morning cut to pieces.

Mr. *Gantt* was sworn; he corroborated the testimony of Captain *Cattell* in all its parts. He said he never heard any man so outrageously abused as *Cole* abused *Cattell*. He accused him of being accessory to killing his hogs, burning his fences, &c.; and that *Cattell* did not give one word of abuse, or provoking language. The other two young men who appeared like lads, did not say any thing, but by their whole conduct and deportment, appeared to be co-operating with *Cole*.

Several grounds of defence were taken on the trial below, which were now renewed as grounds for a new trial.

The jury found the defendant guilty, and this was a motion for a new trial, on the ground stated in the opinion of the court.

Mr. Justice *Nott* delivered the opinion of the court:

The following may be considered as the grounds taken for a new trial in this case, though not in the order, nor in the precise language of the brief:

1st. The facts and circumstances attending the transaction were not such as to constitute a riot.

2d. That as the defendants were acting as a patrol, it could not be a riot, even though similar conduct would be in persons acting without any authority.

3d. That the two young men belonged to the company of Capt. *Cole*, and acted under his authority, and therefore were not answerable for the part which they took in the affair.

4th. If there was any unlawful act committed, it was the beating of the negroes which is made an indictable offence by an act of the Legislature, and a specific penalty imposed, and therefore they ought to have been indicted under the act, and not for a riot.

1st. A riot is defined to be the assemblage of three or

more persons, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprize of a private nature, with force and violence against the peace or to the manifest terror of the people, whether the act were of itself lawful or unlawful, provided they proceeded to execute the thing intended. (1 *Haw.* 155.)

The first ingredient is, that there must be three persons concerned. That requisite was certainly established in this case.

The second is, that there must be an understanding mutually to assist each other. Whether such concert exist or not, may be proved by positive testimony, or it may be inferred from circumstances. In this case the defendants are found to have entered the plantation of the prosecutor in the dead hour of the night. They commenced their career with the firing of guns. They proceeded to kill his dogs, beat his negroes, and abuse himself, and that within the precincts of his domicile and the hearing of his family. To this may be added, that they were armed with swords and guns. What could be better calculated to excite alarm, or disturb their repose? If it had been proved that all the acts enumerated had been committed by one of the party, the others being present, the only inference which could have been drawn from it, would have been, that they were all concerned. For what other purpose could they have been there at that unusual hour of the night? For what other purpose were they armed in that unusual manner? For no other purpose that can be perceived but that of committing the very outrages which were committed. But that is not left to inference. It is admitted that *Cole* was the leader of the party; *Gaskins* acknowledged that he fired a gun. The young men were seen thrusting their swords through the seams of the floor where the dogs were found cut to pieces. The negro woman had been stricken with a sword, and the two young men only were armed in that manner, and their whole deportment manifested a co-operation.

Thirdly. It must be an enterprize of a private nature. There is no pretence that their object was to reform the government, to remedy any public wrong, or to effect any other object of a public nature. It could only have been to injure an individual by a trespass upon his property, and an abuse of his person. It was contended that there was no essential injury done to the prosecutor, or to his property. But that is not material. The killing of a dog, the beating of a negro, and the pulling down of a house, are all equally unlawful acts. They differ only in degree; and for the purposes of this prosecution, one is as unlawful as the other, and no more. And lastly, it must be against the public peace, or to the terror of the people. I have anticipated this ground in the remarks which I have already made. I have shewn that the whole transaction was against the peace, and calculated to excite terror and alarm. All the facts therefore necessary to constitute a riot were clearly established.

2nd. The next question is, whether they were acting as a patrol, and if they were, whether that was a justification of their conduct. Whenever a person is proved guilty of acts *prima facie*, unlawful, and would justify himself under any particular authority, it is incumbent on him to produce his authority, and shew that he was entitled to the character which he assumed; and such justification must be proved by the ordinary rules of evidence. If the defendants allege that they were a patrol, it was incumbent on them to prove it. The evidence was in their possession. The prosecutor had not the means of disproving it. It is contended however that the declaration of *Cole* was evidence of the fact, and that the prosecutor recognized them as such. Whenever an attempt is made to fix a crime on a person by his own confession, it must be taken altogether, as well that part which goes to his exculpation as that which goes to establish his guilt. But that rule is not applicable to this case. The confession of the defendant has not been relied on, on the part of the prosecution. All the facts have been proved by eye-wit-

nesses who were present when they were committed. If the defendants had been sued for the penalty imposed by the act on a patrol for abusing their authority, proof of their acting in that character need not have been produced on their part, because the action itself would have been an admission of the fact. But the mere submission of a person to the exercise of an assumed authority, is no admission of the legitimacy of it. The defendants cannot protect themselves from the penalty due to their offence by the peaceable and unresisting conduct of the prosecutor. There is then no evidence to support that part of the defence. It has been made a question, whether the captain of a beat company can constitute himself the captain of a patrol, and although that question is not necessarily involved in this case, it may be of some importance that it should be decided. The patrol act makes it the duty of the "commanding officer of each and every beat company, to cause to be made out a roll for each patrol district, which shall include the names of all free white male inhabitants above the age of 18 years, residing within the said patrol districts, &c." It makes it the duty of the "commanding officer of each and every beat company at every regular petty muster to prick off from the roll of each patrol district at his discretion, any number of persons who shall perform the duty hereinafter prescribed until the next petty muster, and to every patrol, the commanding officer of the company shall appoint some prudent and discreet person as commander." The act then proceeds to prescribe the duty of the patrol, and direct the manner in which it shall be performed. And if any of the commanders of the patrol abuse their authority, they may be reported to the commanding officer of the beat company, who is required to order a court-martial, &c.— Now we cannot suppose that the Legislature intended anything so absurd, as that the captain of the company should appoint himself a captain of the patrol; much less that he should be returned to himself for misconduct; that he should appoint a court-martial to try himself, and that he

should preside over the court by which he was to be tried ; yet we must believe that the Legislature intended all these inconsistencies in order to give the act the construction contended for by the defendant. It must therefore appear manifest that the duties of the commander of a company are incompatible with those of a commander of a patrol ; and that if he was actually performing the duties of a captain of patrol, he was assuming a character not authorized by the act, and performing, voluntarily, duties which are inconsistent with those enjoined by it. Such dereliction of duties positively enjoined for the performance of one not required, even though permitted, would of itself beget suspicions, particularly when exercised in the manner this was. But admitting this was a regularly organized patrol, it will not aid the defendants. A patrol is not authorized to announce its approach with the firing of guns, to commence its operations by killing a man's dogs whose plantation it has entered, carry them on by beating his negroes, and conclude with abusing himself. If circumstances existed which could in any manner excuse such conduct, or which rendered any degree of violence necessary, such necessity must be made to appear ; but on this occasion, it is not even pretended. It is contended however that it could not be a riot, because the original association was lawful. But it cannot be maintained that merely because a body of men are engaged in a lawful enterprize they will not be responsible for the abuse of their authority.— Thus if the sheriff should raise the *posse comitatus* for the purpose of taking a felon, or suppressing a riot, and should on his way to the execution of his authority turn aside and attack a peaceable unoffending citizen, or tear down his house, he and those concerned with him would certainly be answerable for such an outrage. Whether it would amount to a riot would depend upon the circumstance whether three or more confederated together to assist each other to commit the unlawful act. For if persons who have assembled for a lawful purpose do afterwards associate together to commit an unlawful act, such

association will be considered an assembling together for that purpose. (1 *Haw.* 156.) And if a patrol who originally assembled for the purpose of performing a lawful duty afterwards unite in committing a breach of the peace, it is as much a riot as if the original assemblage had been for that purpose. Would it not be a melancholy state of society where the law was otherwise. The prosecutor said he was actually obliged to remove his family to Charleston, to relieve them from the constant alarm in which they were kept by the turbulent conduct of the patrols. If a person is bound to submit to have his property injured, his person abused, the sovereignty of his house invaded and the repose of his family disturbed, merely because the persons engaged in it are acting under the colour of authority, we are subject to a state of things even worse than that against which they were intended to afford us protection. Patrols are entrusted with high and important powers. The line of their duty may not always be distinctly marked out. They are many times composed of men not very competent to form correct opinions of the extent of their powers : I would not, therefore, be very astute in searching out means to punish those who through an honest, though mistaken zeal in the performance of their duty had been guilty of small excesses, or who from mistaken views of their powers had exceeded the bounds of their authority. But the more extensive the power, the more necessary it becomes to confine the exercise of it within its legitimate bounds and the more criminal is the abuse of it. In this case, I can see no room to doubt but that the association was for purposes as unlawful as their conduct was unauthorized ; and that their offence is aggravated by an attempt to cloak it under the veil of authority.

3rd. With regard to the third ground, there was no evidence that the two young men belonged to the company or were under the command of captain *Cole*. Indeed, if he had no right to command, they were under no obligation to obey. But all these questions were distinctly

submitted to the jury, and I see no reason to be dissatisfied with their verdict.

4th. The last ground is attempted to be supported by the misapplication of a rule of law which of itself is admitted to be correct. Where an act imposes a penalty and points out the manner by which that penalty shall be recovered, that method, and that alone, must be pursued. If the prosecutor had sued for a penalty under the act, the method prescribed by the act must have been pursued. But he is prosecuting for a common law offence, according to the most usual method known to the common law before this act was passed, and which has not been impaired nor altered by the act. The verdict is on every ground entitled to the support of the court, and the motion therefore must be refused.

Justices *Colcock, Johnson, Richardson* and *Huger*, concurred.

Lance & White, for the motion.

Hayne, Att'y Gen. contra.

JULIET G. ELLIOTT, Ex'rx of BARNARD ELLIOTT, *ads.*
WM. B. MINOTT.

It is a general rule that any note, acknowledgment or memorandum in writing, fixing with precision the amount due and the time of payment, will be such a liquidation as will carry interest.

So an order upon a principal, by his agent, for a sum agreed for in favor of a carrier for freight due, will carry interest from its date.

The court will not feel disposed to lend too ready an ear to a charge against a man for embezzling property committed to his care.

Tried before Mr. Justice *Huger*, at Colleton, April
Term, 1822.

THIS was an action of assumpsit on an account for the freight of 2225 bushels of rough rice, at 8 cents per bush-

el, from Mrs. *Elliott's* plantation on Ashepoo, to a mill on Ponpon river. The defence was deficiency in the quantity delivered at the mill. It was proved by the defendant's overseer that he personally measured out at the defendant's barn, (by fixing and measuring the contents of one barrel, and then measuring the whole by it,) which is four miles from Ashepoo ferry, where the plaintiff's boat lay, 2403 bushels of rough rice, and it was headed up principally in barrels in his presence, and sent by the defendant's carts and negroes to the plaintiff's vessel, and there thrown into the hold. The carts were under the direction of Mrs. *Elliott's* servant, who was one of the most trustworthy on the plantation, and who continued on board until the rice was delivered. The overseer was frequently on the road between the barn and the vessel, and thought the rice could not have been stolen on the road, or he must have seen some traces of it. When the vessel was full, by the defendant's direction, her servant *Paris*, went on board and remained with the rice until it was measured at the mill. When measured at the mill, the rice turned out only 2225 bushels as stated by the miller, but neither of the measures were stamped. The defendant filed a discount for this deficiency of 178 bushels. When the overseer had finished loading the vessel, he gave the plaintiff an order on Mrs. *Elliott* in the following words, viz:—
“Mrs. *Barnard Elliott* will please pay to Mr. *Wm. Minott* 8 cents per bushel for the freight of 2225 bushels of rough rice, which he carried to her mill for the estate of *Barnard Elliott*, it being the sum agreed for by me.”

July 8, 1814.

JAMES McQUEEN. .

The plaintiff sent this note to the defendant a few days after and requested payment. She wrote to him in answer that she was ready to settle the amount, if he would allow her a deduction to the amount of the value of the rice which she supposed to be lost. It was admitted that the sum of 2225 bushels in the above order was left blank

by Mr. *McQueen*, and was filled up in the hand writing of the miller.

At the trial, the presiding Judge charged the jury that there was no conclusive evidence of the quantity delivered to the plaintiff's boat, and that the jury should find for the plaintiff the full amount of the claim, but left the case as to the facts to them, and that the foregoing order by the defendant's overseer and miller was such a liquidation of the account as entitled the plaintiff to interest from its date.

The jury found a verdict for the full amount of the account, with interest from 8th July, 1814.

A motion for a new trial was made on the following grounds, viz.

1st. That there was sufficient evidence of the delivery of the rice to the plaintiff on board of his vessel, to charge him with the deficiency.

2nd. That his honor the presiding Judge, misdirected the jury in charging them to allow interest on the account.

3rd. That the verdict was in other respects contrary to law and evidence.

Mr. Justice *Johnson* delivered the opinion of the court :

The defendant is concluded on the first ground of the present motion by the finding of the jury ; not solely, because it was a question exclusively within their province, but the probabilities are, I think, on that side of the question. I should not feel disposed to lend too ready an ear to a charge against a man for embezzling property committed to his care ; and the possibility that there might have been some inaccuracy in measuring the rice at the barn or mill, neither of the measures being stamped, or that it might have been purloined in its transportation from the barn to the landing, furnish strong reason in aid of the verdict.

2nd. The general rule is, that an open running account does not carry interest. (1 *H. Black.* 305. *Newell*

vs. Greswold, 6 *Johns.* 45.) And if the converse of this position is good, it follows that those that are liquidated will; but what act will constitute such a liquidation, is perhaps a question of some nicety, and one about which it would be impossible to lay down any rule which would not be subject to exceptions as numerous almost as the cases which would arise under it. As a good general rule, it may be safely laid down that any note, acknowledgment, or memorandum in writing, fixing with precision the amount due, and the time of payment, will be such a liquidation. Thus a letter of credit which stipulated for the time of payment was held to entitle the plaintiff to interest on the amount of his account. (3 *Wilson*, 205.) So in the case of *Walden and al. vs. Sherburn, et. al.*—(15 *Johnson*, 409,) an account rendered, to which no objection was made, was held to be a liquidation, and to carry interest. (See also 3 *Caines'*, 234.) The order drawn by *McQueen* on the defendant, for the amount of the freight is, within the rule, a liquidation of the account, if he acted in the business under her authority; and I think the proof of his agency is satisfactory.—He was her overseer, and in that character the preparation of the rice for market devolved on him. In his note to her, he states that the contract was made, and the price fixed by him; and although her answer does not contain an express recognition of his authority; yet it is so strongly implied as to be irresistible. Independent of this circumstance, the letter addressed to the plaintiff by the defendant in answer to his demand for the amount, brings the case within the rule laid down. It contains no objection to the account presented, either as to the amount or time of payment, but claims a discount which the jury have found to be without foundation.

The motion is discharged.

Justices *Nott*, *Gantt*, *Colcock* and *Richardson*, concurred.

Ford & De Saussure, for the motion.

Hunt, contra.

The STATE vs. JOHN DUNCAN.

To authorize the court to pronounce judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated.

This court can not amend a special verdict by expunging what may be thought surplusage or supplying a notorious fact, in order to support a judgment of guilty.

The court may amend in some cases, but it has never gone so far as to supply facts incompatible with those found; it would be an infringement of the trial by jury.

TRIED in Charleston :—The defendant was indicted for a nuisance in obstructing Coming's creek, a branch of Ashley river.

The indictment charged that this was a navigable creek and public highway; and the first count charged that the defendant erected and continued a dam across it. The

2nd. Count charged that the defendant maintained and continued a dam across it, which had been before erected. On the trial of the case the jury found the following special verdict:

“We find Coming's creek a highway over which a dam has been erected. That previous to 1770, the landing places on Harleston's green was private property, but subsequent to that period, streets have been located, and Lynch street occasionally used as a landing place. Should this landing be such a one as the law recognizes, we find the defendant guilty, otherwise not guilty.”

On this finding, the Judge who presided in the court below, pronounced the judgment of guilty against the defendant; and he now moved to reverse that judgment on the ground, that by the finding he is not guilty on the charge laid in the indictment, and is therefore entitled to be discharged. If this motion should fail, he moved for a new trial on the ground that the judgment of guilty cannot be pronounced against him on the verdict found.

Mr. Justice *Johnson* delivered the opinion of the court :

To authorize the court in pronouncing its judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated. This cannot happen where they are doubtful, for the obvious reason, that the premises from which the deduction is to be drawn are wanting ; nor can it happen for the same reason where distinct facts are set in opposition to each other.

In examining this verdict, it will be necessary to connect with it for the purpose of understanding it correctly some additional circumstances, and especially as to that part which relates to the landing on Lynch street, on the character of which, it appears from the question propounded by the verdict, the jury thought the guilt or innocence of the defendant depended. Coming's creek, as I understand it, is a small branch of Ashley river, running into the town, on the bank of which Lynch street terminates, and at which is the landing spoken of. The defendant is not charged with obstructing this. And the enquiry whether this is or is not a public landing, is only important so far as it serves to stamp on Coming's creek the character of a highway. If the landing is not public, there is then a terminus to the creek which is inconsistent with the character of a highway. Now if it was necessary, I should not hesitate to pronounce from the bare fact that this landing had been occasionally used since the year 1770, without fixing the time when the use commenced, or how long continued, or without being informed whether the use was general or special, continued or interrupted, that it was not ascertained to be such a landing as the law recognized as public : and it is apparent that the converse of this conclusion was assumed, as the ground on which the finding that Coming's creek was a highway was predicated. So that in truth, the conclusion drawn from a part of the facts stated is at war with other facts, and when taken together the mind is unable to deduce the

unerring conclusion necessary to a legal deduction, and no judgment can be pronounced upon them.

It has been urged in opposition to this motion, that so much of the finding as relates to the landing at Lynch street is irrelevant to the matter in issue, and that the court have the power of amending it by expunging that part as surplusage, and that by the same means they may supply the notorious fact, that the dam, although not erected by the defendant, was maintained and continued by him as charged in the second count in the indictment, and thus be enabled to sustain the judgment of guilty. The power of the court to amend in some cases, has not been controverted and is well supported by authority. (*Vide Croke Eliz.* 480. *2 Rolls. Abr.* 693-5. *Dyer* 372. *1 Chitty Crim. Law* 444-644.) But there must be some limitation to the exercise of this power. No case has been adduced in which it was carried so far as to supply facts incompatible with those found. And I venture to affirm that there is none such ; for if carried to that extent it would be an infringement of the right of trial by jury, to whom the law has confided the determination of facts. Now if the court take upon themselves to amend the verdict by expunging that part, which has been before shewn to be inconsistent with that relied on as evidence of the defendant's guilt, they create a new state of facts inconsistent with that which is expunged. And by the same rule, the defendant might call on the court to strike out that part on which the state relies and the judgment of not guilty would follow. There is, upon the whole, no facts upon which the court can pronounce its judgment, either for or against the defendant, and a *venire de novo* must be awarded.

Justices *Nott* and *Colcock*, concurred.

King & Drayton, for the motion.

Hayne, Att'y Gen. & *Hunt*, contra.

JOHN WILLIAMSON vs. HUGH PATTERSON.

The protest of a notary who is dead, (the hand-writing being proved,) is not admissible to prove a demand on the maker of a note, and notice to the indorser. (a)

As to what acts of a public officer are judicial or extra-judicial, and admissible in evidence.

TRIED at Charleston, May Term, 1821.—This was an action by the indorsee against the indorser of a promissory note. To prove a demand on the maker, and notice to the defendant, the plaintiff offered in evidence, after proof of the hand-writing, the protest of a notary who was dead. The presiding Judge rejected this evidence as inadmissible, and no other being offered, the plaintiff was non-suit-ed, and a motion was now made to set aside the non-suit, on the ground that the evidence was admissible.

Mr. Justice *Johnson* delivered the opinion of the court.

It is conceded by the counsel for the motion, and such is certainly the law, that the declarations or private memoranda made by a deceased witness is inadmissible ; but it is contended :

1st. That it does not apply, because the evidence offered was the official act of the Notary ; and

2dly. That it constituted an exception, inasmuch as it was the best evidence in the power of the party.

It is not necessary to the purposes of this case to consider what official acts may or may not be given in evidence as proof of the facts which they state. That consi-

(a) In consequence of this decision, the Legislature at its next session passed the following Act—"That whenever a Notary Public, who may have made protest for non-payment of any inland bill or promissory note, shall be dead, or shall reside out of the district in which said bill or note is sued, his protest of said bill or note shall be received as sufficient evidence of notice in any action by any person whatsoever, against any of the parties to such bill or note."

deration is superseded by the conclusion that this protest was an extra-judicial act, and could not therefore be otherwise regarded than as a private memorandum. I will proceed therefore to demonstrate the truth of this conclusion. Any act done by a public officer in the discharge of a duty which the law imposes, and from which some legal consequence is to follow, must be regarded as official; and on the other hand, those which the law does not impose, and from which no legal consequences follow, are extra-judicial. The paper protested was a promissory note. The parties resided here, and all the authorities agree that it was not necessary to enable the plaintiff to recover, that it should be protested. (*Kidd on Bills*, 142. *Chitty on Bills*, 240.) No legal consequence resulted from the protest, it was therefore extra-judicial and void. (*Wood's Institutes*, 301.) The only character which it retains is that of a private memorandum. The arguments founded on the necessity of admitting this evidence are drawn from the rule, that in the absence of the highest evidence of which the thing is susceptible, secondary is admissible. Correct as this rule is, it must be understood with proper limitations. It certainly never was intended to let in common rumor or hearsay evidence of passing events; and although it may be difficult to fix with precision the correct limits of its operation; yet from its nature it must cease, when it comes in collision with any other well settled rule, by which the evidence is excluded. One example will be sufficient. In the absence of any other proof, the oath of the party would be the best in his power; but this is excluded by a positive rule. So in this case, the rule contended for is opposed to a settled rule, that private memoranda are inadmissible. I doubt not that many cases have occurred, in which such evidence has been received without objection or opposition. Parties may, by consent, make the rule of evidence for the particular case what they please; and it is not unusual on the circuit to take the oath of one of the parties by consent. These instances ought not how-

ever to furnish a precedent in opposition to the established rules of law.

The motion was refused.

Justices *Nott*, *Gantt* and *Richardson*, concurred.

Condy & Kennedy, for the motion.

Simons & Waring, contra.

HENRY LAZARUS *ads.* JOSEPH AUBIN.

In an action by an indorsee against an indorser, notice of non-payment was proved to have been given the indorser, but the court *Held*, that it was necessary to make the indorser liable to prove an actual demand upon the drawer, previous to the notice of non-payment to the indorser.

TRIED before the City Court, January Term, 1822.
Assumpsit upon a promissory note by the indorsee against the indorser.

RECORDER'S REPORT.

This was an action brought by the indorsee of a promissory note against the indorser for \$356 80, dated on the 11th January, 1819, payable 30 days after date: all the parties to the note resided in the city. The plaintiff proved by the affidavit of a Mr. *Hyndes*, (which was admitted in evidence,) that *Hyndes* carried to the defendant on the 13th of February, 1819, a written notice that the payment of this note had been refused by the drawer, and therefore that payment of it was expected from the defendant. The defendant's counsel contended that the defendant was discharged by the *laches* of the plaintiff, who had not proved any demand upon the drawer, and had omitted, supposing such demand to have been made, to give notice of it in sufficient time to the indorser. I stated to the jury that the defendant could only be liable after the default of the drawer, from whom the holder must first demand pay-

ment, or use due diligence for that purpose before he could resort to the indorser : that in this case I did not think that the testimony amounted to more than a mere communication to the defendant that the drawer had refused to pay ; but it by no means shewed that the witness, or proved that any other person had made a demand upon the drawer, much less that demand which the law requires : that such a demand was a formal act ; that it ought to be made by the holder himself, or by some one authorized by him for that purpose, and that the individual making the demand should be competent to give a legal receipt for the money, if payment was tendered. Had such a demand been proved, I considered that notice had been given sufficiently early, as the days of grace had not expired on the 13th of February.

The jury found a verdict for the plaintiff.

A notice was served upon me that a new trial would be moved for upon the inclosed grounds.

Mr. Justice *Gantt* delivered the opinion of the court :

The court in this case take the same view of the law which the Recorder has expressed in the foregoing opinion, and for the reasons assigned by him, adopt it as the opinion of this court.

A new trial is ordered.

Justices *Richardson* and *Johnson*, concurred.

Colcock, Justice, concurred in the result.

JOHN SMYTH *ads.* Ex'ors WIGFALL. BAUXBAUM &
TRESCOTT, *ads.* The same.

A bond for the prison bounds is equally forfeited, if the prisoner make no schedule within 40 days, as if he had left the bounds.

The amount due upon the execution is the measure of damages in an action upon the bond, and none other need be proved.

A schedule filed in another suit, at a previous time, is not a schedule in compliance with the act.

TRIED before Judge *Nott*, January, 1822.—Verdict for the defendant.

The following is the statement in the brief. The suit was brought by the plaintiff as assignee of the sheriff, upon a bail bond given for the prison bounds by *John Smyth*, at the suit of the same plaintiff. The execution, (*ca. sa.*) was lodged on the 10th November, 1819, and the bail bond, dated 24th of November, of the same year. It was assigned on the 2d January, 1820. The defendant had not left the prison rules, but the breach contended for was, that the defendant had not within forty days after his being admitted to the prison bounds, filed a schedule of his estate. At the time of his arrest, he was in custody at another suit, and had filed his schedule which then remained of record, and on the very day the writ in this case was lodged with the sheriff, he also actually filed a schedule as required by law, being then apprised that it was required, and no damages had occurred or was pretended by the delay of a few days. Under the charge of the Judge that the bond was forfeited, and the sum mentioned in the *ca. sa.* by which *Smyth* was confined, was the measure of damages; although none were proved, the jury found a verdict for the plaintiff for the sum against both principal and securities.

A new trial was moved for, because the securities were only bound that the defendant should remain within the rules, and the omission to file a schedule was only a bar to his continuing within them, and the bond was substantially complied with.

2nd. Because being an action to recover damages for the breach of the condition of the bond, and no damages having been either sustained, pretended or proved, nor even recoverable, except nominal damages.

3rd. Because being in custody at the time, a new schedule was unnecessary.

Mr. Justice *Gantt* delivered the opinion of the court :

By the 3rd section of the act of assembly, passed in 1788, establishing the bounds of the prisons and gaols of the state, it is enacted, “that all prisoners in execution, on any civil process, shall be entitled to the benefit of the said rules, bounds or limits ; provided he shall within forty days after being taken in execution, give satisfactory security to the sheriff of the district where he is confined, that he or she will not only remain within the said rules, bounds or limits, but will also within forty days render to the clerk of the court of the district, a schedule, on oath, of his whole estate, or of so much thereof as will pay and satisfy the sum due on the execution, by force of which he is confined.” And by the 7th section of the said act, it is declared, “that any prisoner committed in execution aforesaid, who shall not give in such schedule agreeably to the tenor of his or her bond, shall not be any longer entitled to the benefit of the prison rules, but his bond shall be forfeited and assigned to the plaintiff.”

The words of the act are so very explicit as to supersede the necessity of comment to ascertain its meaning.—The privilege is extended upon the condition that the party confined will do two things ; keep within the bounds, and render a schedule within 40 days ; and expressly declaring that the bond shall be forfeited and assigned if the schedule is not rendered within the 40 days. By the 3d section, the schedule to be rendered is to be of the whole estate of the defendant, or so much as is necessary to pay the sum due on the execution. Does it not follow that on a forfeiture of the bond for a failure in performing the condition, reference must be had to the amount due on the execution as the standard by which the damages are to be estimated ? I think the conclusion is inevitable. It would be nugatory and idle to require the bond should be assigned, if it was intended only that nominal damages were to be recovered on it. Nay, so strict is the law as to the security which is to be given for the performance of the condition, that the sheriff himself is by the act rendered

liable if he take insufficient security. The act is founded on principles of humanity, but a debtor is not permitted to abuse its kindness. He must *bona fide* fulfil the conditions required of him, on obtaining the benefit of the rules, or forfeit his bond and return to close confinement. For the fulfilment of the terms specified in the condition of the bond, the securities are equally answerable with the debtor himself: they do not alone undertake for the defendants keeping the bounds, but also that the schedule shall be rendered within the 40 days; failing in either, they are saddled with the payment of the debt.

A schedule rendered at a period long antecedent, and in another case, can have no possible bearing on the present question. The appellant can take no benefit from his appeal, which is dismissed. The case of *Trescott* ads. *Ex'ors of Wigfall*, depending on the same facts, must share the same fate.

Justices *Johnson*, *Nott* and *Huger*, concurred.

Colcock, Justice, dissented.

Hunt, for the motion.

Simons, contra.

P. PLUNKET vs. A. BOWMAN.

Where the subscribing witness to a bond is dead or out of the state, the next best evidence to prove the execution of the bond, is the proof of the hand-writing of the obligor with the additional evidence of the hand-writing of such subscribing witness. (a)

THIS was an action of debt on bond. The subscribing witness being dead, his hand-writing was proved, and the plaintiff there rested his case. It was objected that the proof was insufficient without proving also the hand-

(a) See 1 McCord's Rep. 466.

writing of the obligor to the bond. The presiding Judge being of a different opinion, the case went to the jury on proof of the hand-writing of the subscribing witness only, and on the charge of the Judge, that the evidence afforded was sufficient ;

A verdict was found for the plaintiff.

This was therefore a motion for a new trial, on the ground that the charge of the Judge was contrary to law. The case was tried before Mr. Justice *Richardson*.

Mr. Justice *Gantt* delivered the opinion of the court :

It is to me a matter of some surprise that in a case like the present, one almost of every days occurrence, and depending upon the construction of a rule apparently simple and obvious, that there should exist any contrariety of opinion respecting its interpretation on the question submitted for the consideration of the court. Considered abstractly from the perplexity which must necessarily arise from conflicting decisions, it would seem that the question is not one of difficulty. The rule of law is, " that the best evidence is to be produced which the nature of the case admits." Now apply the rule to the case under consideration. Is proof of the hand-writing of a subscribing witness to a bond equally satisfactory and conclusive, as if accompanied with the additional proof of the hand-writing of the obligor ? or in other words, is it that best evidence which the nature of the case admits ? And surely upon this question the answer is palpable that such is not the best evidence. The object is to prove that the defendant did a certain act: the best evidence therefore, the simplest and most obvious proof in such case is the testimony of a witness who saw the defendant do this act. Such evidence is direct and positive, and conclusive of the fact sworn to ; but where this positive proof cannot be had, then the next best evidence which the nature of the case admits, is the information of witnesses acquainted with the person who is said to have done the act, and who from seeing him write, have acquired a knowledge

of his hand-writing; for it is said, that in every person's manner of writing, there is a certain distinct prevailing character, easily discovered by observation, and when once known, may be afterwards applied as a standard to try any other specimen of writing, the genuineness of which is disputed. The witness is asked whether he has seen a particular person write, and afterwards, whether he believes the paper in dispute to be his hand-writing. This course of examination involves two questions :

1st. Whether the supposed writer is the person of whom the witness speaks? and

2dly. If he be the person, whether he wrote the paper in dispute?

The first is a question of identity : the second, a question of judgment, or a comparison in the mind of the witness between the general standard and the writing produced. (*See Philips on Evidence, 367.*) It is true that proof of the hand-writing merely is no conclusive evidence that the instrument written was delivered as the deed of the party, and delivery makes it his deed. Neither does proof of the hand-writing of a subscribing witness to a deed establish the fact of delivery. It is a deduction to be drawn from the evidence offered, whether the instrument was delivered as the deed of the party, and it is obvious to my mind that satisfactory proof of the hand-writing of the party to the instrument, affords a better and surer foundation, from whence to presume delivery than can be derived from the proof of the hand-writing of a subscribing witness ; for thereby, the person of the defendant is identified. You bring home to him the fact of having written his name there by the best possible testimony which the nature of the case admits of ; and as signing the name precedes, and is the usual concomitant of the execution of a deed, the strongest implication arises ; nay, the conclusion follows from the plaintiff's possession of the instrument, that a delivery was also made. But these conclusions do not necessarily arise from proving the hand-writing of a subscribing witness only. Such proof affords

no evidence of the identity of the person of the defendant. It affords in a questionable case but a feeble foundation for presumption to rest upon. It may have been placed there for dishonest purposes, and as it is liable to just suspicion, when unaccompanied with proof of the hand-writing of the party, I think it clear to demonstration, that such evidence alone cannot be said, with any propriety, to be the best, which the nature of the case admits of. But *Philips*, in his Treatise on evidence, page 362, in speaking of attested instruments, and the course to be pursued in proving them, where, from existing circumstances, the witnesses themselves cannot be examined, seems to entertain the opinion that proof of the hand-writing of the attesting witnesses is sufficient proof of the execution of the deed, and says it will not be necessary to prove the hand-writing of the party to the deed. He relies on the following authorities : 2 *East*. 250, the case of *Prince vs. Blackburn*, and the case of *Adams & Wife, ex'ix. vs. Kerr*, in 1 *Bos. & Puller*, 360. I will examine both those cases, and see how far they justify the position taken by him. The case of *Prince vs. Blackburn*, was debt on bond, to which there were two subscribing witnesses.— One had died, the other had left England for America.— Several letters had been written by the witnesses from America, but it did not appear that he was domiciled or settled there. He had gone to America on business from his father. Under these circumstances, it was contended that as the witness was alive, and being one of the persons to whom the contracting parties had mutually agreed to refer for such proof, and as there was nothing to exclude the belief, but that the witness might return and place himself within the reach of the process of the court, the rule could not be relaxed, which required the production of the witness himself. But *Le Blank*, Justice, from the circumstances of the case, thought that the secondary evidence of the hand-writing of the witness, might be received. This appears to have been the only question made in the case. Whether this secondary evidence, when offer-

ed, was or was not accompanied with the additional testimony of the hand-writing of the obligor, does not appear in the report of the case. Nor was it material to the solution of the question submitted, whether the fact existed of the obligor's hand-writing having been proved. This case therefore furnishes no satisfactory evidence on the point before us. The case of *Adams & Wife, Ex'ix. vs. Kerr*, does appear, when read without critical nicety, and minute observation, to be a case in point to establish the position, that the hand-writing of the obligor need not be proved. Judge *Buller*, in delivering the opinion of the court in that case does say, unequivocally, that the hand-writing of the obligor need not be proved, and that the hand-writing of the attesting witness, when proved, is evidence of every thing on the face of the paper, which imports to be sealed by the party. To give however a correct interpretation of his meaning, the particular circumstances of the case on which that opinion was delivered, must necessarily be taken into view. The action was debt on bond. The bond had been given in Jamaica, and was attested by two witnesses. One of the attesting witnesses was proved to be dead, and the other to be resident in Jamaica. The hand-writing of the former only was established, and no evidence was given of the hand-writing of the obligor. On this evidence, the plaintiff had a verdict subject to the opinion of the court. On the motion for a rule to shew cause why the verdict should not be set aside, it was insisted that either the hand-writing of the witness living in Jamaica, or of the obligor, should have been proved. In answer to this, Judge *Buller* says—
“ In this case, one of the attesting witnesses was dead, and the other was beyond the process of the court: the best evidence therefore which could be obtained, was given.— He then adds, the hand-writing of the obligor need not be proved: that of the attesting witness, when proved, is evidence of every thing on the face of the paper, which imports to be sealed by the party.” Now what is the just and correct inference to be drawn from the decision

made in this case? It will be recollected that the instrument was made in Jamaica; the subscribing witness lived here; the inference therefore is very clear from the observation of the Judge, that the best evidence was given which could be obtained; that neither the hand-writing of the obligor or of the witness in Jamaica could be proved. When he concludes therefore, by saying, that the hand-writing of the obligor need not be proved, it seems correct to suppose that he meant only to say, that circumstances may exist, and did exist in this case, which dispensed with the absolute necessity of proving either the hand-writing of the witness, or of the obligor. According to the rule, the best evidence was offered which could be obtained. This appears to be the predicate of the conclusion, and viewed in this light, we offer no violence to the acknowledged learning of that able Judge. We make him coincide in opinion with Lord *Kenyon*, in the cases of *Barns vs. Trompowsky*, and *Wallis vs. Delaney*, (7 Term Rep. 265,) who held, that proof of the hand-writing of the obligor was necessary: but above all, we reconcile his opinion by this means, to the rule itself, which requires the best evidence; a rule which successive judges ought and must interpret for themselves, and in the enforcement of which, no relaxation should be allowed; but in every case, the best evidence which it is in the power of the party to obtain, ought always to be required. I acquiesce the more readily in the interpretation which I have given to the opinion of Judge *Buller*, because, in a very late treatise on evidence by *Espinasse*, he expressly declares, that to support an action of debt on bond where the subscribing witness cannot be procured, proof of the hand-writing of the subscribing witness, and of the obligor of the bond, are necessary. (*Espinasse on Evidence*, p. 16.) I will not animadvert on decisions supposed to have been made in our sister states in opposition to the view I have taken, of what is and ought to be the rule of evidence in such case. The rudder by which we must steer our course is the rule itself, and it has been

the practice in our courts to require proof of the hand-writing of the obligor. This practice ought not to be changed, because others may have adopted a different course. I conclude therefore by saying, that when the evidence of a subscribing witness cannot be had, the next best evidence of which the case is susceptible, is proof of the hand-writing of the obligor, with the additional evidence of the hand-writing of the subscribing witness to the instrument. Where, from circumstances, either becomes impossible, I will not say but that the one or the other may be dispensed with, provided it is manifest that nothing is kept back, and that the best evidence which the nature of the case admits of, has been produced. I think that a new trial should be granted.

Justices *Colcock*, *Johnson* and *Nott*, concurred.

Hunt, for the motion.

Prioleau, contra.



L. DE VILLERS *ads.* T. FORD, *et. al.* The same *ads.*
JOHN C. PRIOLEAU.

A return to an execution by a *deputy* sheriff, is a sufficient and legal return.

To a *scire facias* upon a judgment, it cannot be objected that the judgment was founded on a blank declaration which had never been filled up until after the judgment had been entered; it is sufficient that at the hearing of the *scire facias*, the record when produced was perfect. If it be proposed to set it aside, another proceeding must be adopted.

MOTION in arrest of judgment.—Tried before Mr. Justice *Huger*, at Charleston, May Term, 1822.

These were two actions of *scire facias* on bail bonds, and as they involved nearly the same points, they were tried together. The plea in each case was *nul tiel record*.

To support the action, the plaintiff produced the *ca. sa.* in each case, and relied on the returns annexed to them, which were in the following terms, endorsed "*N. E. I. per Chitty,*" and within "*C. C. Chitty,* a true and lawful deputy, being sworn, returns *non est inventus.*"

For the defendant it was proved by a witness Mr. *L. P. Guirea*, who was requested by the defendant to go to the clerk's office to procure an exemplification of the original records to be used in Georgia, to apprehend one of the principals, that the clerk shewed to him a blank paper instead of the usual form of a declaration, in one of the original actions against the principals, which, it was contended, for the defendant, was no record.

Judgment was given for the plaintiff in both cases.

A motion was now made to arrest the judgments on the following grounds, to wit:

1st. Because the return on the *ca. sa.* was insufficient and illegal, being in so many words the return of the *deputy*, and not of the *sheriff*, when the law requires that the *sheriff* not only should make the return, but also upon oath.

2nd. Because it was proved, that when the action was commenced against the bail in the latter case, that which was called a record had no existence, the verdict and judgment in the original proceedings being founded on a supposed declaration, which in fact was a blank paper.

Mr. Justice *Richardson* delivered the opinion of the court.

The first ground taken in this case has been decided by the case of *Belser vs. Graves*, (1 *Nott & McCord*, p. 125.) There the return was *elongata* as to the goods and *nulla bona* as to costs, and neither sworn to, nor signed by any one. In the case of the *City Council vs. T. Price*, (1 *Nott & McCord*, 300,) the return was the same, but as in the case before us, sworn to by the deputy sheriff.

As to the second ground, it is enough, that the record

when produced, was perfect. It could not be impeached when collaterally introduced. In such a case, the court simply inspects the record, and decides according to the face of it. If the appearance be perfect, it is enough. If it be proposed to set it aside, another proceeding must be adopted, and the party have an opportunity of amending it, before adducing it in evidence. This distinction applies to both grounds taken. If there be an informal return to an execution, the motion should be to set it aside. But it is enough that the requisite return appears, when the execution is introduced, collaterally. In such case, whatever return is in fact upon the execution, we must suppose sanctioned by the proper officer. Any other rule would involve a case in too many unexpected issues; would introduce the means of surprise, not to be guarded against, and greatly endanger the necessary force and effect of records.

The motion therefore is dismissed.

Justices *Nott*, *Huger* and *Johnson*, concurred.

Cross & Gray, for the motion.

Toomer, contra.

F. DEPEAU, & Co. vs. S. HYAMS.

Where the agent of the captors libelled the prize in their own names, for the captors, and the prize goods were sold by the order of the Court of Admiralty, the court *Held* the agents might bring an action in their own names for the purchase money.

Also *Held*, that the Marshal, who made the sales was a competent witness to prove the same.

Tried before Mr. Justice *Richardson*, May, 1822.

THIS was an action to recover the amount of certain goods bought at the marshal's sale. The marshal was

examined by commission, subject to any objection to his competency, and proved the purchase by the defendant, of certain prize goods, sold by order of the Court of Admiralty. The plaintiffs were the agents of the captors, and sued in their own names.

A motion for a non suit was made and overruled.

Verdict for the plaintiffs. The motion, for a non suit, was now renewed, and another made for a new trial, upon the grounds,

1st. Because there was no privity of contract between these parties.

2nd. The decision of the Judge was against law, &c.

Mr. Justice *Richardson* delivered the opinion of the court.

The sale of the goods and purchase by the defendant were proved by the marshal, who being a mere agent for the purpose of the sale, without interest on either side, was a competent witness. And we come to the enquiry relied upon, to wit : whether it was competent for the plaintiffs to issue in their own names? They were the agents of the captors ; and had libelled the prize in their own names for the captors ; all the proceedings were in their own names, and the sales made at their instance, and in their names, for the captors. They were then in the equity, and had the same qualified property as consignees, factors and commissioned merchants, who may sue in their own names for their principals. (See *Baerman vs. Radenius* 7, T. R. 663. 2 *Espinasse Rep.* 653. *Lex Mercatoria* 401.) *Buller*, (p. 130,) says where a factor to one beyond seas, buys or sells goods for another, an action will lie against or for him, in his own name. The credit and the promise will be presumed to be to him. So common is this practice, that we find it laid down as settled, that the principal also may sue. (*Lex Mercatoria* 400. *Buller* 130.) And if the factor sue, the defendant may still set off a debt due by the principal. But there is a principle, which, in my judgment, renders the

qualified property in prize agents more apparent than in any of those analogous examples. The property in the prize is never transferred to the captors, so as to divest the original owners, until after the sentence of condemnation. *Wheelwright vs. Depeyster*, 1 *John. Rep.* p. 471. And the application to the Court of Admiralty, having been in the names of the plaintiffs, though for other persons, the fair construction of the sentence and transfer of the property is to them, for their principals. Suppose what may be, and is often done, that the court had, after sentence, not ordered the sale, but re-delivered the property to the agents, and they had personally sold it. They would then have been, to all intents and purposes, merchants selling on commission, and might sue, as is customary, in their own names. But the court having at their request, or to pay costs, or for any other purpose, directed the sale to be made by the marshal, changed no other privilege and altered no right, and the marshal became simply the sub-agent of the parties concerned, precisely as if in the case supposed the commission merchant had employed an auctioneer to sell the goods of his principal. A promise to the auctioneer is a promise to the proper party interested. Where the consideration comes from the plaintiff, a promise to a third person is sufficient. (See 1 *Bos. & Puller*, 101.)

The motion is therefore refused.

Justices *Nott*, *Huger* and *Johnson*, concurred.

Colcock, Justice, dissented.

———, for the motion.

———, contra.

JAMES B. RICHARDSON vs. GEORGE WHITFIELD.

The filing of consistent double pleas, so far as their merit is concerned, is a mere motion of course, which only requires the signature of council.

There may be cases of extreme hardship or gross fraud, which would justify the Circuit Court in rescinding the orders of a preceding term, yet when one Judge has granted leave to plead the statute of limitations, another Judge will not interfere.

The statute of limitations, having once commenced to run, is not suspended by the defendant's going out of the state.

BY process of attachment.—This was an action of assumpsit, by process of attachment, to recover back the price paid for a negro (*Jack*,) who turned out to be unsound.

The defendant had pleaded the general issue, and at January Term, 1821, he obtained an order of the court, granting leave to plead the statute of limitations.

Some time after, this plea was accordingly filed, and when the cause came on to be tried at the May Term following, the plaintiff's counsel moved to strike out the plea of the statute of limitations, on the ground, that the order, under which it was filed, was obtained without his having had notice of the application for it. This motion was overruled, and the case went to the jury, and they returned the following special verdict. "We find for the plaintiff on the general issue, and if the court should be of opinion that he is not barred by the statute of limitations on the facts hereinafter found, we assess his damages at seven hundred and eighty-eight dollars. On the plea of the statute of limitations, we find that the plaintiff purchased the negro *Jack* of the defendant on the 20th February, 1805. That it was known to the plaintiff in one month thereafter, that the said negro *Jack* was diseased of fits, and that on the 27th day of April following, the defendant left this state, and has never since returned to it, and if, under these circumstances, the court should be of opinion that the plaintiff is barred, we find for the defendant."

The writ was lodged in the sheriff's office on the 5th of March, 1817, so that nearly twelve years had run from the date of the contract, before the bringing of the action.

The plaintiff now renewed his motion to strike out the

plea of the statute of limitations, and for leave to enter up judgment on the finding on the general issue. In the event of failing in this motion, he then moved for leave to enter up judgment for the plaintiff on the special verdict generally.

Mr. Justice *Johnson* delivered the opinion of the court :

The defendant has a legal right to defend himself against the action of the plaintiff on as many different grounds as the nature of the action, and the merits of his defence will allow, and as a right, the court has no power to withhold it. The only limitations to it are,

1st. That they shall not involve the ridiculous absurdity of being inconsistent, and,

2dly. That they shall not operate as a surprise on the plaintiff, by being made at the moment of the trial, when he cannot be expected to meet them.

Within these limitations, the court has no control over the right, and the whole object of applying for leave to plead double, is to preserve them : so that in truth, the filing of consistent double pleas, so far as their merit is concerned, is a mere motion of course, which only requires the signature of counsel. (*1 Chitty on Pleading*, 610.) It is not denied, that according to the uniform practice, these pleas are to be regarded as consistent. Indeed I have never heard it questioned, and the only question is whether in respect to the order obtained, and the filing of the plea, it was calculated to surprise the plaintiff. The order had been obtained at a preceding term, and the plea filed in vacation in the usual way, and if the plaintiff had been vigilant, he must have been apprised of it in time to prepare to meet it, and if in truth he was not, it might have been the foundation of an application to the discretion of the court for a continuance ; but that was not the object ; for it is apparent that this motion was an effort to get rid of a legal, and therefore a meritorious defence, which would probably, and in the result, will be fatal to the plaintiff's case.

There is another view of this question. The effect of striking out this plea would have been a virtual rescision of the order under which it was filed ; and notwithstanding there may be cases of extreme hardship or gross fraud which would justify the court in rescinding the orders of a preceding term, yet, in this case, both the order to file the plea, and the application to strike it out, were addressed to the discretion of the court, and if it was permitted in those cases, there would be an end to every thing like judicial discretion. The cases of *Durant vs. Staggers*, (2 *Nott & McCord*, 288,) and *Macon vs. Mathis*, (1 *McCord*, 172,) are, I think, decisive on this question.

The motion for leave to enter up judgment on the special verdict generally, involves a question of more importance. The finding as to the time when the plaintiff purchased, and when he came to the knowledge that the negro was unsound, is applicable only to the enquiry as to the time when the action may be said, within the meaning of the statute to have accrued. But a discussion of that question is superseded by the fact, that the defendant remained here more than a month after the last event—so that whether the action accrued at the time the contract was made, or when the unsoundness of the negro was known to the plaintiff, is unimportant, as the statute in either event had commenced to run before the defendant went away, and if it continued to run, the plaintiff was barred at the time the action was brought. The only question submitted by the special verdict therefore, is whether the statute having once begun to run, its operation was or was not suspended, by the defendant's going out of the state ? The negative of this proposition, as a general rule, has never been controverted. It is the received doctrine in the English courts. It prevails in New York, and the case of adm'rs of *Adamson vs. Smith*, (2 *Const. Decisions*, 273,) decided by this court, is in accordance with it. For the doctrine and cases applicable to it, I refer without comment to the case of *Faysoux vs. Prather*, (1 *Nott & McCord*, 303,) where they are col-

lected and digested in the most masterly manner. In referring to this case, it is not intended to revive the discussion of the question there agitated, and which some of my brethren regard as still unsettled, but with a view barely to notice, that this case does not fall within the reason of the exception contended for in opposition to the operation of the rule. The contest there was whether the saving in the statute in favor of infants did or did not extend to cases where the right which accrued, was incumbered with a partial operation of the statute; as in that case, where a descent is cast after the statute has begun to run against the ancestor? But here the plaintiff and defendant are the immediate parties to the transaction, out of which the action arose; and, admitting for the sake of argument, that that case constituted an exception, this is not analogous to it, and it was incumbent on the plaintiff to shew that there was another, within which, this case comes. No case of the sort has been produced, and I believe none such exist. The converse appears to me so palpable that the probability is that the question has never been made.

The motion is therefore refused, and leave given to enter up judgment for the defendant.

Justices *Nott*, *Richardson* and *Colcock*, concurred.

Gantt, Justice, dissented.

Pepoon, for the motion.

King, contra.

· **PHILIP GIVENS vs. S. T. BRANFORD.**

A marriage settlement, though not recorded, protects the property settled against the claims of a creditor who had received explicit notice of the settlement previous to his contracting.

THIS case was tried before Mr. Justice *Huger*, at Coosawhatchie, April, 1822, in which there was a special

verdict, submitting to the court, the distinct and specific question, "whether notice of the existence of a marriage settlement, previous to the contract, on which the cause of action arose, would bar the plaintiff, (who was a creditor seeking to make the property settled liable,) although the settlement had not been recorded within the time prescribed by the act; and if so, they found for the defendant; if not, for the plaintiff."

The presiding Judge gave judgment for the defendant, and this was a motion to reverse that decision, and for leave to enter up judgment for the plaintiff, because the Judge was mistaken in the opinion delivered.

Mr. Justice *Richardson* delivered the opinion of the court.

The question submitted is, whether a marriage settlement, though not recorded, protects the property settled against the claims of a creditor who had received explicit notice of the settlement? This question depends upon the construction of the act of 1785, (*P. L.* 357,) for recording marriage settlements: and this act is one of those which having but one object in view and purporting to regulate but one subject, the preamble is really important and may be justly called, in the figure of *Coke*, the key to unlock and expose the true intention of the legislature. The preamble is in these words, "whereas the practice, &c. of keeping marriage contracts, &c. in the hands of those interested therein, hath been oftentimes injurious to creditors, &c. who have been induced to credit, &c. such persons under a presumption of their being possessed of an estate subject, &c. to the payment of their just debts." Here we perceive manifestly, that the mischief to be remedied, was the deceitful appearance of an estate, which induced credit to be given to the ostensible holder, when, in fact, he had no estate whatever; "for remedy whereof," (the preamble continues,) "and to prevent said deceitful practices, be it enacted that, &c. all and every marriage contract, &c. now existing, after being duly proved, shall

be recorded or lodged in the secretary's office to be recorded," &c. &c. "and all that shall hereafter be entered in- to for securing any part of the estate, real or personal, of any person or persons whomsoever, shall within three months after the execution thereof, be duly proved, in like manner to be recorded," &c. Here we find the remedy for the evil complained of, as plainly prescribed, i. e. recording within a given time, at a specified office. For what purpose recorded? Evidently, to prevent such settlements being thereafter concealed in the hands of those interested therein; and to give notice "to all who might, in the language of the act, be induced to credit such persons under a presumption of their being possessed of an estate, subject to their just debts." The entire end and aim of this enactment is clear and single. It is to guard every person, disposed to give credit, against the deceitful semblance of an estate, by giving them notice of its true situation, and its proper owner. When notice is actually received, the remedy proposed, is substantially afforded, and the end of the law fulfilled. So far the act is explicit, and its purpose manifest. But it goes on to declare as follows; "and in case any person or persons, &c. whomsoever, interested in such marriage deed, &c. shall neglect or refuse to record or lodge the same in the manner or within the times before mentioned, and in the office aforesaid, to be recorded, then the same, in respect to creditors, shall be deemed, and is hereby declared to be fraudulent; and all and every part of the estate hereby intended to be secured to such person or persons, shall be subject and liable to the payment and satisfaction of the debts due and owing by such person and persons in as full and ample a manner to all intents and purposes whatsoever, as if no such deed, &c. had been ever made or executed." The literal import of these words might subject the estate settled to the payment of debts, if the marriage contract be not recorded in the place, manner and time prescribed, notwithstanding actual notice by any other means. Yet convenience, consistency and reason, require that we should regard the ob-

jects of the act, and respect the course of adjudications, upon similar acts. The act before us is, in strict analogy to the registering acts, to guard against double mortgages and sales ; and these, notwithstanding their positive enactments, have been uniformly construed so as to give effect to the first deed, though unrecorded, in preference to the second, though duly recorded ; whenever it is clear that the grantee of the second deed had, at the time of the taking it, explicit notice of the former deed. This construction is founded upon the justice, reason and necessity, of preventing a man from making use of an act in order to commit a fraud, which act was intended to shield him against the frauds of others ; and has been uniformly made and adjudged by the judicial tribunals which we respect.

In the cases of *Le Neve vs. Le Neve*, 3 *Atk.* 649. *Shelden vs. Cox*, *Ambler* 624. *Tolland vs. Shanbudge*, 3 *Vesey*, *J.* 478. *Clive vs. Dodd*, 2 *Atk.* 275. *Doe vs. Routledge*, 2 *Cowper* 705, we find the rule fully considered and adopted in the English courts, where it is decided that, though the registry act is positive, that a registered deed shall take place of one unregistered, yet the latter will not be set aside in favour of one who knew of it at the time.

In Massachusetts, (4 *Mass. Rep.* 537, *Farnsworth vs. Child*,) it is adjudged that the first conveyance, tho' unregistered, shall be valid against a second purchaser, having notice of the former conveyance.

In New-York, (*Jackson vs. Burgot*, 10 *Johnson*, 457,) the Judges say that the second purchase, with actual notice of the prior deed, is held to be fraudulent, and the question of notice and fraud is cognizable as well in a Court of Law as in a Court of Equity.

In the case of *Pierce vs. Turner*, (5 *Cranch*, 154,) the Supreme Court of the United States, in construing the Virginia Registry Act of the 13th December, 1792, for recording marriage settlements and other deeds, decided that a subsequent purchase with notice of a prior unre-

corded deed, cannot prevail against the first purchase.

And in the case of *Tart vs. Crawford*, (1 *McCord*, 268,) this court, notwithstanding the expressions of the act of 17th March, 1785, (*P. L.* 381,) “shall be void and incapable of barring the rights of persons claiming as creditors or under subsequent purchases recorded,” came to this conclusion, “that whenever the subsequent purchaser has received explicit notice of the former conveyance, such conveyance, though unrecorded, will be valid, legal and effectual against the conveyance of such purchaser, though recorded in due time.”

As this is the first time that the question has arisen under the act of the 8th of March, 1785, for recording marriage contracts, and as there is some difference of opinion, I have noticed the uniform current of decisions under analogous acts. They are so many, and so uniformly proceed upon the same grounds, and have been so far recognized by this court as in my judgment to form a rule for the construction of such acts, not to be departed from, when the act is open to construction. It is a rule not only of good faith, but to restrain bad faith; for if with a knowledge of the marriage settlement, a man will still give credit to the apparent holder of the estate, he cannot do it, upon the presumption that the estate is his, nor unless he intends to defraud the real owners, the *cestui que trusts*. A contrary rule, while it professes to prevent a mere legal fraud, would pervert the essential characteristics of the act, and cover direct turpitude under its specific provisions; it would then be an act, not more to prevent deceitful practices generally, than to encourage them in certain instances. Upon the whole then, in the practical application of the provisions of the act to their proper objects, while we advance the remedy proposed, which is notice to the creditors, we are not less bound to make such a construction as will suppress the entire mischief complained of, so as to detect fraud, whatever cloak it may assume: and assuredly it is not the less worthy of detection, when it seeks to hide itself under the mantle of

the law. Drawing therefore the construction of the act from its true intent, with a due regard for respectable adjudications, and a steady eye to the principles of good faith, a majority of the court are of opinion that the actual notice of the marriage contract received by the plaintiff is sufficient to bar his claim upon the estate so settled, simply because from him its true situation was not concealed. The motion is therefore refused, and the *postea* ordered to be delivered to the defendant.

Justices *Nott*, *Gantt*, *Huger* and *Johnson*, concurred,

Colcock, Justice, dissented.

Martin, for the motion.

Petigru, contra.

JOHN EVERINGHAM *ads.* JOHN LANGTON.

Where incompetent evidence has been admitted, the court will not pretend to judge how far it did or did not influence the jury, but will grant a new trial.

In an action by a book-keeper of a bank, for money had and received, on account of a "short charge" on a check (overcharged,) the book-keeper's book kept by him, unaccompanied by his oath, (the check not being produced,) cannot be admitted in evidence upon proof of his hand-writing.

MOTION for a new trial.—Tried before Mr. Justice *Huger*, May Term, 1822.

This was an action for money had and received ; paid, laid out, and expended, &c. The particular filed was for short charge on check of the defendant, at Planters & Mechanics Bank, \$2000 on 5th October, 1815.

The first witness produced was Mr. *Prince*, who testified that he had searched the bank, and could find no check of the description alleged. He stated on his cross

examination, that he knew nothing of the check in question.

Mr. *Gibbs* was then called, and by him the plaintiff attempted to prove an entry of the check in question, in the book kept by one Mr. *Pritchard*, and in his hand-writing, who was living and residing at Cheraw in this state. An objection was made as to the admissibility of such testimony, on the ground that Mr. *Pritchard* should have been examined.

The objection was sustained by the court, and the book was rejected.

Mr. *Gibbs* then proved by the cash book kept by himself, as collection clerk, that on the said 5th October, 1815, he entered in said cash book a check of the defendant for \$2269 92, payable to A. B. or bearer. He also proved that there were other checks of the defendant paid and entered in his book on that day.

The plaintiff then introduced the book-keeper's book of the year 1815, kept by and in the hand-writing of the plaintiff, for the purpose of proving a short charge of said check.

The defendant objected to this, on the ground that the plaintiff could not deduce proof for himself from his own acts, that however it might be between the bank and the defendant, yet, as between the plaintiff and the defendant, the fact proposed was not susceptible of proof by a book entry made by the plaintiff himself; and furthermore, that such entry could not be proved by secondary evidence, to-wit, proof of hand-writing, when better evidence was at hand, to-wit, the person making the entry; that if such entry could be proved at all, it must be by Mr. *Langton*, the plaintiff present in court—that if Mr. *Langton* himself could not prove the entry, a *fortiori*, it could not be proved by secondary evidence, that is, by hand-writing.

The presiding Judge, however, overruled the objection, and Mr. *Gibbs* was examined on said book. He stated that on the said 5th of October, 1815, there was no entry

in the book, of any check of the defendant, for \$2269 92, but one for \$269 92, besides three others of different amounts. It did not appear that said "short charge" was detected until the 6th April, 1819: That for the year 1815, the defendant was a very large depositor in the bank: that on the 11th of October, six days after the alleged short charge, there was a balance in favour of the defendant of about \$4000, and that during the quarter year comprehending the 5th October, the weekly balances were in favor of the defendant, except three weeks. This witness, together with Mr. *Malcolm*, an experienced bank officer, and Mr. *Blackwood*, president of the bank, stated in substance, that it was inexplicable how an error of \$2,000 in the book keepers books should have remained undiscovered beyond the quarter in which it was embraced. Indeed, if in copying from the check, an error had been made, inasmuch as the tellers book and the cash book were checks upon the book keepers book, the daily revisals could hardly have failed to detect the error, and furthermore, that the error must have been discovered in the quarterly balance sheet, because it would not have agreed with the cashiers account, which would have induced an enquiry and led to the detection of the error, if there had been any.

Mr. Justice *Colcock* delivered the opinion of the court:

As all the grounds taken in this case, except the first and last, were abandoned, it is unnecessary to advert to any others. The first is, that the presiding Judge erred in admitting the book-keeper's book in evidence, on the proof of hand-writing and entry, and under the circumstances of the case. The last is, that the check, which would have been the highest evidence, and ought to have been in the possession of the bank or the defendant, (unless lost or mislaid, of which there was no proof,) was not produced, and no evidence of any notice to the defendant to produce it, if in his possession, nor even satisfactory evidence of its not being in the bank, was given.

As a general rule of evidence, neither the act of a plaintiff nor his books can be given in evidence in his favour.

There are exceptions to this general rule, but I think it clear that the case before us is not embraced in any of the exceptions. The books of a merchant are evidence to prove the delivery of goods, so of a mechanic to prove the execution and delivery of the articles made ; but these are admitted from the necessity of the case ; because in the ordinary transactions of life, these deliveries take place most frequently in the presence of the parties alone. But the fact to be proved in this case, from its nature, is susceptible of abundant proof from other sources, and that too within the reach of the plaintiff. Corporation books are admitted, and manor books between members of the same corporation or manor ; but it is laid down expressly by *Philips*, (1 vol. p. 320,) that they are not evidence against a stranger for the corporation or manor, “a *fortiori*,” not for one individual of a corporation against a stranger. But in pursuing the subject, books are only evidence when they are regularly kept (by the same authority) in any case. Here, the error which is calculated to destroy the effect of the evidence, is to be the very foundation of recovery.

But it is said a new trial ought not to be granted, even if the book was not legally introduced, because it could not have weighed any thing with the jury.

It is sufficient to remark, that this court has said, that they will never undertake to determine that point even where they have thought that the evidence could not have produced any effect. Yet, if illegal, they have granted a new trial, as in the case of *Ring & Huntington, & Hunter & Lahief*, decided during this term. But in my opinion, the book, and that alone, did shew a mistake on the trial.

On the second ground, I think it was indispensably necessary to have served the defendant with a notice to produce the check before any evidence of its contents could have been given. It appears from the testimony of Mr. *Prince* that checks were usually delivered up to the draw-

ers every quarter settlement. It was then proving nothing which would account for the loss of it, to prove that it had been looked for in the book, (looked for where he could not expect to find it :) And this doctrine is too familiar to require a reference to authority for its support. The check was the highest evidence of the amount for which the defendant had drawn, and consequently the very *substratum* of the plaintiffs claim. There may have been a mistake, yet not the mistake complained of, that would alone appear by the check or evidence of its contents. I may add that this is a case which called for the most satisfactory evidence. In proportion as a fact to be proved is unusual and difficult of proof, so in proportion should the testimony be strengthened. Such an occurrence as that alleged to have happened in this case is in opposition to that order, regularity or exactness, which it is believed, is observed in banks, and which is certainly essential to their very existence.

The motion is granted.

Justices *Gantt* and *Richardson*, concurred.

Clarke, for the motion.

Grimke, contra.

JOHN SCOTT vs. WILLIAM WOODWARD.

Any thing may be given in evidence, in reply, which is a direct answer to that produced on the part of the defendant.

So in trespass to try titles, where the defendant has shewn an elder grant, the plaintiff may do away the effect of it, in reply, by proving an adverse possession.

Barnwell, Spring Term, 1822.

THIS was an action of trespass to try title. The plaintiff produced a grant to himself for the land in dispute,

and proved that the defendant was in possession at the time that the action was brought ; and here he rested his case.

The defendant produced a grant to *Arthur Simkins* for the same land of anterior date to that of the plaintiff.

The plaintiff then offered evidence of an adverse possession, which, it was contended would operate as a bar to a recovery by the defendant, although he held under an elder grant.

An objection was made to the adduction of such evidence, on the ground that it ought to have been produced in the first instance and was not admissible in reply.

The objection was sustained, and the jury gave a verdict for the defendant.

This was a motion for a new trial on the ground that the evidence offered by the plaintiff, in reply, ought to have been received.

Mr. Justice *Nott* delivered the opinion of the court.

If a person have several distinct titles to a tract of land, he may avail himself of them all to enable him to hold against any opposing claim. And although there can be but one good title to the same land, yet, as it may be doubtful, which, among several is the best, if he should happen to be defeated in one, he may resort to another. Thus, if a person should claim by devise, and it should be shewn by the opposite party that the will was obtained by fraud or not properly executed, he might nevertheless shew that he was entitled to hold by descent. But the objection is not in this case, that the testimony was incompetent, but that it could not be admitted in reply. Any thing may be given in evidence in reply, which is a direct answer to that produced on the part of the defendant. If a defendant give in evidence a release, the plaintiff may reply forgery. If he offer a discount, the plaintiff may shew that it has been paid, or as in this case, that it has been barred by the statute of limitations. In the case under consideration, the defendant produced an elder grant ; the plain-

tiff offered to do away the effect of it by proving an adverse possession. Until the defendants grant was produced, the plaintiff had shewn a good title in himself. And when a plaintiff has established his case he need offer no further evidence until some proof is offered on the other side to destroy or impair it. The plaintiff could not know that the defendant would rely on an elder grant, or that he even had one, until it was produced. And even if he had known it, would not have been required and perhaps not allowed to impede the business of the court, by giving evidence in anticipation of testimony which might not exist or not be produced. And although such a method of proceeding must necessarily allow the defendant the right of rejoining in evidence, yet, that furnishes no objection. Such a course must frequently be pursued when a defendant is permitted to give in evidence, any special matter which leads to a distinct issue, in which he stands in the situation of a plaintiff. This position may be illustrated by a single case, not of unfrequent occurrence. To an action of assumpsit, a defendant may give in evidence a discount. The plaintiff may reply the statute of limitations, to which, the defendant may rejoin a subsequent promise. But this is not a new question. A similar question arose in the case of *Alexander McKie vs. Justice Reynolds* as early as about the year 1801 or 2. The land had been sold under execution, by the sheriff of Spartanburgh, as the property of the defendant, and purchased by the plaintiff. On the trial, he produced a regular chain of title, and proved the defendant to be in possession. The defendant disclaimed any right to the land, but defended his possession under a deed from himself to a third person previous to the judgment under which the plaintiff claimed. The plaintiff offered in reply a deed from the person to whom the defendant had conveyed. That evidence was rejected by the presiding Judge ; but on an appeal to the constitutional court, a new trial was granted on that ground, and the plaintiff recovered on the next trial. It is a convenient and necessary practice, calcula-

ted to shorten rather than protract the investigation of a cause. It tends to the furtherance of justice, and to avoid a multiplicity of suits.

The motion therefore must be granted.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

Felder, for the motion.

Martin, contra.

ANDREW TALVANDE vs. OCTAVIUS CRIPPS and SOL. MOSES. *The Same vs. The Same. The Same vs. OCTAVIUS CRIPPS and JNO. A. GROVES.*

Where *O.* distrained for rent as administrator, and as agent for the heirs, (of whom he himself was one,) and the tenant replevies, and during the action of replevin, *C.* dies, the court *Held*, that the action of replevin did not abate, but that the co-heirs and joint tenants of *C.* by filing a suggestion, might be permitted to come in and defend the suit.

CHARLESTON, Spring Term, 1821.—These were three actions of replevin. The two first against *Octavius Cripps* and *Solomon Moses*; the third against *Octavius Cripps* and *John A. Groves*. In one case, *Octavius Cripps* issued a warrant of distress in his own name, as administrator of *John S. Cripps*, and as agent for the heirs. In another, he states himself administrator only; and it does not appear in what character he issued the third, as the warrant is not produced. In the two first cases, *Solomon Moses* was a constable, who executed the warrants of distress. The last was executed by *John A. Groves*. In all the cases, *Octavius Cripps* avows the taking for rent in arrear due to himself, and makes cognizance as bailiff for several other persons by name, as co-heirs with *John S. Cripps*, and joint tenants with him.

self of the premises. While the proceedings were in this state, *Octavius Cripps* and *John A. Groves*, both died. A motion was then made in the Circuit Court to strike the cases from the docket, on the ground that they had all abated by the death of *Octavius Cripps*. This was opposed by the co-heirs and joint tenants of Mr. *Cripps*, who moved that they might be permitted to come in and defend the suits. An order was made that they might be made defendants, and that the plaintiff might proceed against them. This was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court:

We have no act of our own to direct us in the decision of this question ; and but few of the British statutes on the subject of replevin are of force in this state. Our courts have been governed partly by the rules of the common law, and partly by the British statutes, which have been adopted in practice, though not made of force by any Legislative act. Whenever therefore a new question arises, we must conform our decision to the nature of the action, and the general practice of our courts. A replevin is in fact an action of trespass. The plaintiff charges the defendant with having unlawfully taken his goods. But as the defendant has taken them under color of law, the plaintiff cannot deprive him of the possession without entering into a bond, with security to return them again if he should fail to establish the wrongful taking. The proceedings therefore ought to be so modelled as to preserve the relative rights of the parties. The plaintiff has a right to make the landlord (or the person distraining) a party to the action, as well as the officer executing the warrant.— So on the other hand, the landlord may come in and be made a party, and defend his bailiff against the action. In the same manner, a landlord is permitted to come in and be substituted in the place of his tenant in an action of trespass to try title, although there is no act of the Legislature authorizing such a proceeding. What then ought to be the course of proceeding in this case? *Octavius*

Cripps, the ostensible defendant, is dead. The action of course abates as to him ; but the interest of the other joint tenants remain as before. And shall the plaintiff be permitted to withhold from them the property, to the possession of which, they have an apparent right, without affording them an opportunity to try the question, according to the condition of his bond? Justice would seem to require that he should not ; and it only remains to inquire, whether law and justice are, in that respect, at variance. In *Sellon* it is said, “ there is a difference between pleas in abatement in replevin and in other actions, arising from the peculiar nature of the proceedings in replevin. In other actions, as actions of assumpsit, debt or trespass, the plaintiff is not put into possession of any thing until after judgment and execution thereon. As soon therefore as the writ or count is quashed by a judgment for the defendant, on a plea in abatement, the defendant is thereby restored to the same situation in which he was before the action was brought : but in replevin, the mere quashing the writ or count does not afford the defendant complete redress, the plaintiff being in possession of the defendants goods by previous delivery from the sheriff. To remedy this inconvenience, and to entitle himself to a return of the distress, the defendant must to a plea in abatement in replevin, subjoin a suggestion in the nature of an avowry or cognizance. In analogy, with that proceeding the joint tenants of *Octavius Cripps*, have a right to file a suggestion to entitle themselves to a return of the distress. The plaintiff will nevertheless be permitted to prosecute his action against them if he chose to do so. The court is therefore satisfied with the order made in the court below, and this motion must be refused.

Justices *Colcock* and *Johnson*, concurred.

Hunt, for the motion.

Toomer, contra.

WILLIAM READ vs. JOHN DUNCAN.

Under a declaration for *money had and received, paid, laid out and expended*, the plaintiff cannot give in evidence fraud and misrepresentation in the sale of a chattel.

Where there has been an express warranty, the action must be upon such warranty, and not upon any implied warranty.

Wherever fraud or deceit forms the ground of the right to recover, a *scienter* must be alleged and proved.

A bill of sale, it seems, forms no exception to the general rule that parol testimony is inadmissible to contradict or explain a deed.

ASSUMPSIT.—Tried in Charleston, Spring Term, 1821.

This was an action brought to recover back the purchase money of a negro man slave, who was alleged to be unsound, by reason of which the consideration had failed.

The declaration contained two counts, one for money had and received, and the other for money paid, laid out and expended.

To support this action, the plaintiff produced a bill of sale, which contained the following words, “a negro man slave named *Tom*, without any manner of warranty, except as to the property.” The plaintiff offered to give in evidence, fraud and misrepresentation on the part of the defendant at the time of the sale, which was objected to by the defendant, but was permitted by the presiding Judge. The plaintiff also offered in evidence a conversation that passed between the parties at the time the bill of sale was executed, explanatory of, and contradictory to, the words of the bill of sale. That evidence was also objected to, but the objection was overruled, and the evidence went to the jury, who found a verdict for the plaintiff.

This was a motion for a new trial, on the ground that the presiding Judge erred in permitting the evidence above objected to, to go to the jury.

Mr. Justice *Nott* delivered the opinion of the court :

It is now a rule so well settled, as to have become a fundamental principle in every action, that a correspondence between the allegations and the proof must always be required. A person must always allege and distinctly state whatever it is necessary for him to prove ; and he must always prove whatever it is necessary, in support of his action, to allege, and which is denied on the other side. By a reference to the bill of sale in this case, it appears that the defendant sold, “ without any manner of warranty, except as to property.”

If by the word “ property” used in this instrument, we are to understand that the seller meant to warrant the soundness as well as the title of the negro, the plaintiff can not recover in this form of action, because he had a higher remedy by action of covenant on the deed. For although this court has held, that an implied warranty of soundness may exist where the party has by deed given an express warranty of title only, yet it has never held that an action on an implied warranty could be maintained, where there was an express warranty by deed to the same effect. But on the contrary, it has been decided that the action must be on the covenant. If by that word, however, we are to understand that he warrants the title only, then a warranty of soundness is not only not implied, but is expressly negatived. The plaintiff, therefore, can recover only on the ground of fraud or deceit. And whenever fraud or deceit forms the ground of the plaintiff's right to recover, a knowledge of the facts relied on, (or the *scienter*, as it is sometimes expressed,) constitutes the gist of the action, and must be expressly alleged and proved. In this declaration, we find no allegation of fraud. It does not even appear how the cause of action arose. It is barely stated that the defendant is indebted to the plaintiff a certain sum of money *had and received*, and the like sum of money *laid out and expended* at his instance and request. The evidence, therefore, went to establish a substantive and distinct cause of action from

that laid in the declaration. Nothing is more conducive to the ends of justice or the security of parties litigant than that the cause of actions should be set out with clearness and precision, and that the bounds of actions should be distinctly marked out and preserved. It is unnecessary to determine which would have been the most appropriate form of action, assumpsit or an action on the case for deceit. For in either case the *scienter* must be alleged where the cause of action arises from the fraud.

In the case of *Stewart & Wilkins*, (*Douglass* 18,) Lord *Mansfield* says, "selling for a sound price without warranty, may be a ground for an assumpsit, but in such case it ought to be laid that the defendant knew of the unsoundness." The declaration in this case contains no such allegation, and the testimony therefore ought not to have been admitted.

It has been contended that a contrary decision was made in the case of *Shelton vs. Garry*, (1 *McCord*, 470,) a manuscript report of which was read in the course of the argument. But by comparing the two cases, no such inconsistency will be found. That was an action on a promissory note given for the purchase money of a tract of land. The defence was, that at the time of sale, the plaintiff pointed out to the defendant certain land as belonging to him, which he knew was not embraced in his grant. The court held, that either a breach of warranty or fraud was a good ground of defence. So on the other hand, a breach of warranty or fraud is a good cause of action. But the difference between the causes of action and grounds of defence is this,—a plaintiff must always set out his cause of action in his declaration. He can not be permitted to state one thing, and prove another. The same principle applies to a defendant where it is necessary to set out the grounds of his defence in a plea. But he can be subject to no such restraint where the matter of his defence is given in evidence under the general issue. He may then avail himself of every thing which according to the rules of pleading, may be given in evidence to shew

that the plaintiff ought not to recover. The decision, therefore, in the case above alluded to, (*Shelton vs. Gurry*, 1 *McCord*, 470,) is in perfect harmony with the opinion now expressed. It is frequently necessary to embrace a number of counts in a declaration for the purpose of meeting the various views which a cause may present in the course of its investigation. And a plaintiff is never permitted to give in evidence any matter not thus laid in his declaration, however consistent it may be with the nature of the action. Thus, for instance, on the declaration now before us, the plaintiff could not give evidence of goods, wares and merchandizes, sold and delivered, nor of work and labour done for the defendant. Yet, the defendant might go into evidence of fraud, breach of contract or any other fact pertinent to the issue, which would go to defeat the plaintiff's action. The evidence of fraud ought not, therefore, to have been admitted in this case, and a new trial must be granted on that ground.

I am not required to express any opinion on the other ground. I think it is not improbable, however, that if it stood alone, that also would furnish an obstacle to the plaintiff's success of no inconsiderable difficulty. I am not prepared to say that there is any thing in this case to make it an exception to the general rule, that parol evidence shall not be admitted to contradict or explain a deed.

The motion is granted.

Justices *Johnson*, *Coleock*, *Richardson* and *Gantt*, concurred.

King, for the motion.

Ford & DeSautsire, contra.

THE COMMISSIONERS OF THE POOR OF ST. PAUL'S PARISH,
ads. EDWARD LYNCH, (Relator.)

This court has the power to direct the commissioners of the poor to discharge the duties which are imposed on them by the various acts of

assembly, when they fail to do so; but whenever a discretion is given, the court will not interfere, unless it be clearly shewn that this discretion has been abused.

This court will not by mandamus enforce a contract with the Commissioners of the Poor; the parties must be left to their usual actions at law.

The Commissioners of the Poor are not bound to support children paupers who have left the district; for had they remained in the district, they might have bound them apprentice to some trade.

Mr. Justice *Colcock* delivered the opinion of the court:

THIS is the first instance, within my knowledge, of an application of this legal character against the Commissioners of the Poor. The power of this court to control all inferior jurisdictions and subordinate magistrates, and to compel them to the performance of those duties imposed on them by law, I think cannot be doubted as one mean of effecting these great objects of political economy and public justice. The writ of mandamus is used, and may issue in all cases where there is a legal right which is withheld, and no other legal remedy for its enforcement. And even in some cases, where there is another remedy, which is not as effectual, it may be resorted to. Within the last century, it has been liberally interposed for the benefit of the citizen, and advancement of justice. (*Baron Title Mandamus.*) There is no doubt then that this court have the power to direct the Commissioners of the Poor to discharge the duties which are imposed on them by the various acts of assembly, when they fail to do so. But whenever a discretion is given, the court will not interfere, unless it be clearly shewn that this discretion has been abused. There are few subjects in political economy of greater difficulty in their practical application than provisions for the poor. The facts stated in the suggestion of the Relator, and the answer of the Board of Commissioners, by their chairman, present two questions.

1st. Whether it was the duty of the board to discharge the demands of the Relator for the maintenance and education of the children, founded as it is alleged, on a contract with the former board; and if so, whether this court can compel them to do so?

Secondly. Whether it was their duty to consider the children as paupers, and to make further provision for them?

As to the first question, the court are not prepared to say, that the board were bound to pay the demands of the Relator. If, as stated in the suggestion, there was a contract entered into between him and the Board of Commissioners, he has a vested, legal right, which he can enforce by an action at law. For admitting the great variety of purposes, to which the writ of mandamus has been applied, I think no case can be found in which it has been used, to compel a body of men or an individual to pay a debt.

In determining the second question, it is necessary to take a view of duties imposed on the Board of Commissioners of the poor, and the powers and authority given to them by the acts of the Legislature.

In the year 1712, while the union of state and church authority remained unbroken, the supervision of the poor was committed to the vestries of the different parishes.

By the act of 1789, the powers and authorities of the vestries and church wardens were transferred to the justices of the County Courts, where such were established.

And by the act of 1791, these powers were given to commissioners of the poor to be elected, according to the provisions of that act throughout the state, who are expressly authorized to levy a tax for the purpose of raising such sum or sums as shall be necessary for the relief and education of the poor, within their respective parishes.— And by the 29th section of the said act, (2 *Brev.* 129,) it is enacted, that in case any poor children shall be chargeable to the respective districts, it shall and may be lawful for the commissioners of such district, to bind any such child or children out to be an apprentice, until every male child shall arrive to the age of 21 years, and every female, until she shall arrive unto the age of 18 years, or be married. Admitting that these children were entitled to relief from the parish, (a fact which the court does not un-

dortake to decide,) it is clear that the commissioners, in their discretion, might put them to school, or bind them out. And it appears from the Relator's statement to the board, that they were not in the parish at the time. If then they had elected the latter mode of disposing of them, (binding out,) they could not have done so. How then can the Relator complain of a neglect to discharge a duty, the discharge of which was prevented by his own act, or even supposing it the act of the former board. When an application was made to another set of officers, who might take a different view of the subject from their predecessors, it was requisite that the children should have been present, and given up to the board to be disposed of as they might conceive most advantageous to all concerned. And I am satisfied that it is the duty of the Commissioners of the Poor, in every district, to bind out, as early as possible, all poor children. It is their duty, because they should not impose the tax on their fellow-citizens when it can be avoided. It is their duty, because it is most beneficial to the children themselves. A profuse disposition of the public money, in this particular, is calculated to encourage a regular system of pauperism, an evil much to be dreaded, and one by which the country, from which we derive our system of laws, is now most grievously oppressed, and from which the united wisdom and benevolence of the most distinguished statesmen cannot relieve her. Upon the whole, the court see no ground for their interference. The motion is dismissed.

Justices *Nott, Johnson, Richardson* and *Gantt*, concurred.

Petigru, for the motion.

Lance, contra.

THOMAS FLEMMING vs. BARNARD MULLIGAN.

Where a note, made bona fide for valuable consideration, is brought into market, it may, like any other property, be sold for less than its nominal value.

A note endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against the maker and indorser in the hands of an innocent indorsee; and the fact of the note being a renewal for a part of the original contract, it being between two of the parties to the original contract, does not vary the case. But where a third person, innocent of the usury, takes a new note, it is valid.

It seems, even if a part of a security be for a valid debt, and part for an usurious transaction, the whole will be infected, and this where separate notes are given.

THIS was an action by the indorsee, against the indorser.

Plea, usury.

The note was drawn by *John Everingham* for \$ 2250, payable to *J. Lazarus, jr.* at sixty days. It was indorsed, 1st. "*J. Lazarus, jr.*" and 2nd. "*B. Mulligan*," the defendant. In this shape, it was sent into the market. *David Sarzedas*, into whose hands it was put, said he called on Mr. *Mair*, a broker, who took the note into the plaintiff's house, and returned shortly after and paid him the amount, deducting ten per cent. discount, and one per cent. brokerage. On *Mair's* examination, he stated that he did not state to the plaintiff that it was a note made to raise money; nor did he recollect any of the particulars of the transaction. He said, however, that he had no recollection of ever having negotiated any discount at so high a rate, but admitted very distinctly, that it was probable it was discounted at an usurious rate, and said at perhaps 2 1-2 or 3 per cent. per month.

The plaintiff, by the addition of his name as endorser, negotiated it at the bank. When it became due, it was renewed. On this renewal, *Loyd & Sons* became endorsers. It was in this shape renewed from time to time, and partial payments made until it was reduced to \$ 1400, for which amount this action was brought.

So far as it was made a question whether the rate of discount was usurious, it was submitted to the jury; there was no dispute about it in the court below. It seemed to be a matter conceded by both sides.

The jury found a verdict for the defendant, and a new trial was now moved for on the following grounds, as stated in the brief.

1st. That the evidence did not establish the fact, that the note in question was the renewal of one which was sold at more than legal discount.

2nd. That the sale of the original note, if the note in question was the renewal of the note sold by *Mairs* was not usurious, inasmuch as the price given was not proved.

3rd. That the sale if proved was not usurious, as the note was in market for sale to the highest bidder.

4th. That no usury between the maker and payee was pretended, and any subsequent sale by the holder was legal; that the note in question was the property of the Planters and Mechanics Bank when it was drawn, and no usury in that note was proved.

5th. That the action in this case arose from the payment by the plaintiff who was the last indorser, (except the drawer who indorsed it to the bank,) to the holder, thus giving a right of action against the first and other indorsers.

6th. That *John Everingham*, who was the drawer of the note, was an incompetent witness to prove the usury as between two indorsers, and the statute only refers to suits for the penalty.

Mr. Justice *Colcock* delivered the opinion of the court.

This case, in many of the points, is the case of *Wilks & Brumar* (*post*) and therefore little more need be added to the opinion delivered in that case. The prominent points of difference are, that in this case, the action is not brought on the original note, but a renewal for a balance, part having been paid.

In this case also, the third ground was pressed on the court more strenuously than in the case of *Wilks & Brumar*, and may therefore require some additional observation. Where a note made *bona fide* for valuable consideration is brought into the market, it may like any other

property, be sold for less than its value. It is then always a question of fact for the jury, whether the note is one of that character, or was made to evade the statute ; and it is clear to my mind, in this case, that the original note was of the latter kind : it had no legal existence until the plaintiff paid a consideration for it ; and the evidence, as well as the verdict of the jury, establish the fact that it was made for the purpose of raising money. According to the settled construction of the statute against usury, when unrestricted by any subsequent enactment, a negotiable instrument, if usurious in its original concoction, is void in the hands of a *bona fide* holder, (15 *Johnson Rep.* 44.) The circumstance of the order in which the names of the parties to the loan appear upon the instrument, is not the criterion of determining its validity. The question is, whether it was in the first instance employed with a view to a usurious contract ? Thus a note endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against both maker and indorser in the hands of an innocent indorsee ; for, notwithstanding the indorsement, the transaction contemplated in the creation of the note, was between the maker and the person discounting it. And whether the lender's name appears upon it or not, in no wise varies the case. (2 *John. Ca.* 60. 3 *Do.* 66, 206. 4 *Mass.* 161. 5 *Do.* 293. 2 *Campbell*, 599. 2 *Phillips on Evid.* p. 13, in note.)

The fact of this note's being a renewal for a part of the original contract, it being between two of the parties to the original contract, does not vary the case ; for where a bond has been given upon a usurious contract or consideration, which is afterwards cancelled, and a new bond given upon the same terms, it is clear that the substitution of the one security for another, cannot avail the parties to the usury, because, as the second bond was given in consideration of the first, which was paid, it follows that the second must be void also. (*Comyn on Usury*, p. 183.

Cuthbert & Haley, 8 Term Rep. 390. *Tale & Wellings*, 3 T. R. 537.)

And even if a part of a security be for a valid debt, and part for a usurious transaction, the whole will be infected, and this even where separate notes are given. Thus A. being indebted to B. for different usurious loans, applied to B. for a further advance, which B. agreed to make at the legal rate of interest, provided A's father would give his security for it, and also for a part of the previous debt, to which A's father consented, and accordingly accepted three bills; the two first of which happened exactly to cover the amount of the legal debt. In an action on the second bill, the Court of Common Pleas held, that the acceptances having been given partly as a security for an illegal debt, were all tainted with the illegality, and therefore void. (*Comyn on Usury*, p. 168. 1 Mass. Rep. 349.)

But where a third person, innocent of the usury, takes a new note, it is held valid. A. for a usurious consideration had given his note to B. who transferred it to C. for a valuable consideration, without any notice of the usury; and A. afterwards gave his bond to C. for the amount of the note. The court held, that this bond was not vitiated in the hands of C. by the original usury, to which he was no party, (8 Term Rep. 390,) for the most obvious reasons as assigned by Lord *Kenyon*, and all the rest of the judges in their separate opinions; that this was a new contract between different parties, founded on a new consideration, to-wit, the full amount paid by C. (10 *Johnson*, 194-5.)

The sixth ground was decided in the case of *Executors of Thomas vs. Brown*, (1 *McCord*, 557.) There the drawer was determined to be a competent witness in an action on the note against the indorser.

The motion is refused.

Nott, Justice :

I concur in this case, on the ground that the question

has been decided in the case of *Jno. Wilks vs. William Brummer*, (below.)

Justices *Johnson* and *Richardson*, concurred.

Hunt, for the motion.

Heath & Clarke, contra.

WILLIAM BRUMMER and his Wife, a sole dealer, *ads.*
JOHN WILKS, indorsee.

Where in consequence of an usurious agreement, a person is procured to indorse the note given in the usurious transaction, although such indorser at the time knew nothing of the usurious contract, yet his indorsation is void, as usurious.

IN the City Court, April Term, 1822.—Assumpsit on a promissory note—defence, usury.

The following is the report of the Recorder.

“*John D. Kirk* deposed that he went to *King* to borrow money, that *King* told him if he would deliver to him a note for \$100, drawn by the witness, and indorsed by *Mrs. Brummer*, he would give him \$75 for it : that this note was accordingly drawn and delivered to *King*, upon which he gave the witness \$75. The witness told *Mrs. Brummer* he wished her to indorse the note to enable him to borrow money from *King*, but he did not state to her what he was to get for the note.

Mr. Spriggs said he was present at the conversation which took place between *King* and *Kirk*, though he did not pay much attention to it ; but he saw the note for \$100 delivered by *Kirk* to *King*, and also, *King*, upon receiving it, give \$75 to *Kirk*.

The plaintiff's counsel contended that usury had not been proved, so as to discharge the indorser, inasmuch as the note was not usurious in its inception, because one of

the conditions of the loan was that Mrs. *Brummer* should indorse the note, before which, the contract was not complete. I stated to the jury, that according to the testimony, it appeared to me that the defence of usury had been fully established. The jury found a verdict for the plaintiff. Notice was served upon me that a new trial would be moved for upon the grounds which are inclosed."

Mr. Justice *Colcock* delivered the opinion of the court:

In this case a new trial must be granted, for the verdict is directly contrary to law. It was contended that the jury disbelieved the witnesses, and therefore found for the defendant. But the court will not suppose this possible. The court will not believe that a jury would capriciously exercise the power of determining on evidence. The evidence was all on one side of the case, and the character of the witnesses was not impugned. Nor is there any reason for the court to believe that the witnesses were men of bad character. If the fact be so, it was doubtless susceptible of proof, and like every other fact of which a party wishes to avail himself should have been proved; and if it had been proved, the court might have been induced to believe that the case had been determined on the evidence, and consequently have suffered the verdict to remain.— But in the discharge of the high and important duties which devolve on juries of this country, I do not think them authorized to exercise such a power as to determine that a witness is not to be believed, whose testimony is uncontradicted, and whose character is unimpeached—even if he be a man of suspicious character, it is unjust, both as it regards the witness and the parties:

1st. As to the witness, why shut the door of repentance against any man? A man may see the error of his ways, and wish to return to the path of virtue: he may have erred in some things, and yet be unwilling to make a solemn appeal to his God to witness his infamy?

2d. As to the parties, if the testimony be contradicted, or the character of the witnesses attacked, other testimo-

of the witness-
ter. Again, a
h, and if there
the fact to be
y, if the party
ouble of prov-
h may cause

At. If the sta-
ped be a monu-
words of the
eta, promises
any principal,
as aforesaid, to
pon or for any
be reserved or
he hundred, as
and proportion,
inmodities, are
of none effect,"
ading to be on-
ven per cent. in-
so, in the lan-
parties, to de-
ed, that the de-
ore the money
the purpose for
not a party to
he protection of
was the object
dged case. An-
the loan of mo-
died themselves
ine and human
1st. the statute
ords in the law
ted to allow the
conscience. But

from the reign of Henry, the 8th, in England, and now, throughout the civilized world, interest is allowed. It is nevertheless deemed politic to fix and establish by law the rate of interest. After doing so, it is of importance to prevent avaricious persons from exceeding this established rate of interest in their contracts, as well as to punish them in the event of their doing so. Of what importance is it then, whether the indorser is ignorant of the usury or not? Is the illegal or corrupt intent the less, because all the persons whose names are on the note, are not informed of it? Or is it the less so, because it may pass into the hands of an innocent indorsee? The law never visits the punishment designed for the guilty on the innocent. The indorsee, who is cheated by the usurer passing to him a note contaminated with usury, and therefore void, may have his action against him and recover. But the note originally contaminated with usury is void, pass where it may. And the books abound with cases in support of this position, and which, in the facts, cannot be distinguished from the case before us. The case of *Jones vs. Hake*, (2 Johns. Cas. p. 60,) is of this description. There, as in the case before us, money could not be raised on the note as at first made; but the broker was told, "if you will procure the indorsement of *Peter A. Schenck*, I will get the money." The Judge in delivering the opinion of the court, says, "if we admit no shift or device to elude the statute against usury, and look through the forms under which the parties intended to cover the loan, it appears to me there can be no doubt but that the contract was usurious, and therefore void. In 2 Camp. Rep. p. 599, is another case directly in point. It was an action on a bill of exchange. The drawer, the defendant, was ignorant of the purposes for which it was intended, and therefore stood in the same situation of this defendant who indorsed this note, and who was by this indorsement, the drawer of a bill.

The drawer's ignorance is immaterial. Had the bill been in existence before the agreement, the usury between

the parties would not have vitiated it in the hands of the plaintiff; but the agreement was the cause of its formation. "If a bill of exchange must be valid, because the parties to it cannot be proved to have had notice of the occasion for drawing it, and the purposes to which it is to be applied, this would be an easy recipe for evading the statute of usury. And the same doctrine will be found in the opinion of Lord *Kenyon*, in the case of *Cuthbert & Haley. Payne & Trezvant*, (2 Bay, 23) *Lowe & Waller*, (*Douglass*, 735 :) and in a number of other cases collected in *Comyn on Usury*, from page 164 to 182, which is concluded with a remarkable case of a bill, good in its origin, or at least so considered in the discussion of the case, but contaminated with usury by the payee passing it for less than its value, being held void as to the innocent indorsee, who was obliged to establish his right of recovery through the indorsement of the payee.

The motion is granted.

Justices *Richardson*, *Johnson* and *Colcock*, concurred.

Gantt, Justice :

As the jury have found for the plaintiff, their verdict assures me that it was not a case of usury—the issue having been on the plea of usury. I therefore dissent from this opinion.

——— for the motion.

——— contra.

GEORGE BAMPFIELD vs. MICHAEL ELLARD.

A person in gaol under a *ca. sa.* for assault and battery, is entitled to the benefit of the insolvent debtor's act.

It seems that "wilful and malicious trespass" within the 8th clause of

the insolvent debtor's act, means "wilful maihem," or injuries to real property, or to trespasses of an extremely heinous nature; as malicious prosecutions or conspiracies, by which life and limb may be endangered.

IN the City Court, April Term, 1822.—Motion to discharge an insolvent debtor.

Report of the Recorder.

"The defendant applied for the benefit of the insolvent debtor's act. He was opposed by the plaintiff's counsel upon the ground, that being imprisoned under a *ca. sa.* in an action of trespass for an assault and battery, which was a case of "wilful and malicious trespass," he came within the exceptions of the act. The question to be determined by the court is, whether an assault and battery is a wilful and malicious trespass," within the meaning of the 8th clause of the insolvent debtor's act?

By the 1st clause, all persons may avail themselves of the act, who are "sued, impleaded, or arrested for any debt, duty, demand, cause or thing whatsoever." These words are so comprehensive, that they would embrace every species of civil action, and must be considered as having that scope, unless their meaning be restricted by the exceptions contained in the clause referred to. I regard it to be an established rule in the construction of statutes, that general enactments shall prevail unless they be directly or necessarily impugned by particular exceptions. And this rule would be peculiarly relied upon in a law, the object of which, was the extension of the liberty of the citizen, by abridging the number of the cases in which his person could be immured in a gaol. If therefore, either a technical meaning, or a meaning consistent with common sense, can be given to the words relied upon in the 8th clause, so as not to deprive the petitioner of what he seeks for, it appears to me to be the duty of the court to grant his application. The suit against the petitioner is an action of trespass, *vi et armis*, for an assault and battery. The defendant has been guilty of a trespass, but is it that "wilful and malicious trespass" which the

law contemplates? The generic term trespass, includes both trespass on the case, and trespass *vi et armis*—Standing alone it would have a most extensive application, but the important expressions are, “wilful and malicious.” Such a meaning then must be given to them as will distinguish cases of trespass, in which a debtor shall, and in which he shall not be entitled to the benefits of the act.—The meaning cannot be governed by the form of the action, but by the nature of the act, for which redress is sought. This is certainly rather a dubious criterion, but I see none other to resort to. Now, although an assault and battery is frequently attended with very aggravating circumstances, yet such is not always the case; for courts, where indictments are preferred for assaults, frequently feel themselves authorized to inflict merely a nominal fine, and juries in civil actions to assess trifling damages, tho’ the offence be legally established. But in strict legal intendment, even these mitigated instances would be “wilful and malicious” trespasses, if any assault and batteries are to be so considered. Some other meaning must therefore be annexed to these words, and I am unable to give this meaning, otherwise than by concluding either that the words “wilful and malicious” trespass were intended as another definition or description of an action for “wilful maihem,” or that they are applicable to injuries to real property, or to trespasses of an exceedingly heinous nature, such as malicious prosecutions or conspiracies, by which life or liberty may be endangered. Cases of these and of similar kinds, coming within the meaning of the law, may very well be conceived. It has been stated by the petitioner’s counsel, though I have not seen the case, that the Constitutional Court has determined, that a party imprisoned under a *ca. sa.* in an action for defamation, may have the benefit of the act. (*Walling vs. Jennings*, 1 *McCord*, p. 10.) If so, from analogy he would be entitled to it in the case before us; for to slander the reputation is, at least, “as wilful and malicious,” as to commit an assault upon the person. And there is this tech-

tical distinction between the two actions, that in a case of defamation, the words are alleged to be maliciously spoken, and in that of an assault and battery, malice is not averred. Besides, under the act of 1787, a defendant imprisoned for the payment of a fine which may have been imposed in consequence of his having been found guilty under an indictment for an assault and battery, may be released under the insolvent debtor's act. Now the Legislature could never have intended that this right should exist in a criminal prosecution, and not in a civil suit. I am therefore of opinion that the petitioner is entitled to the benefit of the act upon his complying with its requisites. The petitioner was accordingly discharged. A notice was served upon me, that a motion would be made before the Constitutional Court to reverse my decision."

Mr. Justice *Colcock* delivered the opinion of the court.

The court unanimously concur in the above opinion for the reasons given, as well as on the authority of the case of *Walling & Jennings*. Motion discharged.

Justices *Richardson*, *Johnson*, *Nott* and *Gantt*, concurred.

White, for the motion.

De Saussure, contra.

Ex Parte CHARLES W. DOYLEY, Ex'or DAN'L DOYLEY.

Where a party sued in the City Court of Charleston, applied for a *certiorari* to remove the case to the Circuit Court, on the ground that he had a discount to set up, the amount of which exceeded the City Court jurisdiction, the court refused it on the ground that the defendant might have his cross action; and besides, he was sued in his own right, and his discount was as executor.

MOTION for a writ of *certiorari*, made before Judge *Richardson*.—Refused.

An action was commenced in the City Court, on a note, by *John Gordon* against *Charles W. Doyley*, executor of *Daniel Doyley*. A discount was set up by the defendant, which exceeded the jurisdiction of the court. The defendant therefore filed his petition in the Court of Common Pleas for a writ of *certiorari*: and by his affidavit set forth, that he had a good and substantial defence, by way of discount; and that he was precluded from the benefit thereof in the City Court, because the amount of the discount exceeded the jurisdiction of the court.

On hearing the petition and affidavit, the Judge refused to grant the writ, and the defendant appealed from the decision:

1st. Because the writ of *certiorari* is by the common law grantable in every case wherein it may be necessary to promote justice, or prevent any injury to either of the parties:

2d. The Act of Assembly, which prescribes the terms of issuing the writ, requires no more than that such circumstances of hardship or of equity, as justify the application for this remedy shall be verified by the affidavit of the party:

3d. The affidavit of Mr. *Doyley* was sufficient, and the matter therein contained, do make such a case, as fully to authorize a writ of *certiorari*.

Mr. Justice *Richardson* delivered the opinion of the court:

The act regulating the method of obtaining writs of *certiorari* enacts, &c. (*P. L.* 373,) "that the party desiring a writ of *certiorari* shall apply by petition to one of the Judges of the Circuit Court, setting forth the reasons of his or her desiring such writ, and shall make oath before a magistrate to the truth of the allegations of such petition; and then such Judge may, under his hand, order or award such writ to the party praying the same, or may refuse such writ, according as the matter may appear to him just and necessary, or not. And the clerk of the

Circuit Court shall issue such writ, if ordered as aforesaid, and shall carefully file such petition and affidavit in the office, and shall also take bond from the petitioner in such penalty as shall be directed by the Judge ordering and awarding such writ, payable to the adverse party, with one or more sufficient securities, for satisfying and paying all such sum or sums of money, with costs, as shall be adjudged to the adverse party in the cause to be removed."

The question is, was the writ just and necessary? The note declared upon by the plaintiff, had been given by *Charles W. Doyley*, styling himself executor of *Daniel Doyley*. The discount offered, consisted of several notes of *D. Doyley*, formerly discounted and credited to the plaintiff in 1816; several sums of money paid in 1821; and of two negroes taken in payment by the plaintiff: in all, equal to \$5,737 00; to be set off against an account of \$4,367 00—leaving a balance of \$1,370 00 due *D. Doyley*, deceased. Before the writ of *certiorari* issues, it should appear that the defendant has both a competent and just defence, which can be adjudged better in this court than in the Inferior Court, and also better than in any other court, where the case may be carried. In a word, the defence should be manifestly suitable and peculiarly proper for this court. Now the case before us was against *Charles W. Doyley*, personally, upon his note; and it was at least doubtful, whether the discount, being in *autre droit*, i. e. in the right of the testator, *D. Doyley*, could be set up as a defence at bar. Again, the account filed as a discount, seemed more properly to require the aid of a Court of Equity, where this case may yet terminate. If so, the *certiorari* would probably only serve to create delay. It should be noticed too that this defence was not one arising out of the plaintiffs claim, but consisted of a cross action which may be instituted in another form in the Court of Law or Equity. So that the defendant cannot eventually lose his remedy.

The motion is therefore dismissed.

Justices *Colcock*, *Nott* and *Gantt*, concurred.

ADAM TUNNO vs. CHRIS. HAPPOLDT, Adm'r of Jno.
M. HAPPOLDT.

A Mortgage upon certain property, to secure a note (not under seal,) will not, under our administration law, give such creditor a priority, as in the nature of a deed, to simple contract creditors.

Tried before Judge *Richardson*, at Charleston, in January Term, 1822.

THIS was an action of assumpsit, brought by the holder of two promissory notes, against the representative of *John M. Happoldt*, the maker. The administrator of *John M. Happoldt* obtained leave of the court to file the plea of *plene administravit præter*, in addition to the general rule, and the question arose upon one item in the administrators accounts, viz: Whether a certain instrument in writing was to be ranked, in the legal order of payment of intestates debts, among bond creditors or among simple contract creditors.

By consent of the counsel on both sides, a special verdict was found by the jury in the following words, viz: "And as to the defendants second plea of *plene administravit præter*, we find that the said *John M. Happoldt* departed this life, leaving no judgments or other debts of higher decree against him, but leaving one bond to the Union Bank, and one obligation or sealed instrument of mortgage and covenant to *Thomas Ogier*, and simple contracts to an amount far exceeding the assets of his estate. That the administrator of *John M. Happoldt* has paid off both the aforesaid bonds or obligations, and charged them on his accounts, and has in hand the sum of \$784 49, to be divided in average proportion among the simple contract creditors. If the court should be of opinion that the aforesaid sealed instrument to *Thomas Ogier* is an obligation, and to be preferred to simple contract creditors, we find for the defendant on his second plea of *plene administravit præter*. But if the court should be

of opinion, that the said instrument to *Thomas Ogier*, is to be paid in average and proportion only with the simple contract creditors, then, we find for the plaintiff."

By consent of parties, the court below, without argument, pronounced judgment in favour of the defendants plea of *plene administravit*, with leave to appeal. And the present motion was made to reverse the decision of the court, upon the ground, that the said instrument should be ranked in the class of simple contracts only.

Mr. Justice *Richardson* delivered the opinion of the court:

The claim of Mr. *Ogier* was by simple contract, i. e. by a note. And the question is, can the mortgage deed change the character of the note, or give it a preference to other simple contract debts under the administrators law.

I cannot perceive any reason in supposing the simple contract debt changed by the mortgage. That deed gave a particular lien upon certain property, but here its object and intent terminated, and otherwise left the note as it stood before, still a simple contract. The *postea* must, therefore, be delivered to the plaintiff, with leave to enter up judgment upon the special verdict.

Justices *Colcock*, *Nott*, *Gantt* and *Johnson*, concurred.

Gadsden, for the motion.

Ford & DeSaussure, contra.

GEO. A. FISHER *ads.* ROTEREAU & WIFE.

To call a person "a thief," "a bloody thief," is actionable ; and though the words seem to have been spoken in a passion, yet the Court would not disturb the verdict.

Verdict £400 for the plaintiff.

THIS was an action of slander, brought against the defendant for calling the wife of the plaintiff, "a thief," "a bloody thief," words uttered by him with some heat, while an altercation was had between him and the said wife of the plaintiff, relative to some liberties taken with a young woman, whom the defendant attempted to kiss. They were accompanied by language and circumstances which rendered it doubtful whether the defendant had any intention of accusing the wife of the plaintiff of having committed a felony, but showing that the words were merely rude and unbecoming expressions.

A verdict was found for the plaintiff; and a new trial was moved for on the ground, that the words were not uttered in a sense actionable in themselves; and as no special damages were pretended, the verdict should have been for the defendant.

Mr. Justice *Richardson* delivered the opinion of the court:

The words charged were proved. It appeared that they were uttered in a verbal altercation between Mrs. *Routereau* and the defendant, in which, the defendant being irritated, became indecent in his behaviour, and may possibly have meant no charge of felony. Upon this point the strongest testimony was that of Mrs. *Gerard*, who said she understood the charge of theft, "as blackguard expressions," and not as a charge of felony. Yet she said further, "she believed he meant Mrs. *R.* had robbed or stolen," but she did not know of what. And finally said "she did not understand the word felony." The charge was repeated three times. The last time, the defendant called Mrs. *R.* "a bloody thief." There was, perhaps, room also for concluding that the words were uttered in heat and passion. But they do *ex vi termini* import felony, and are slanderous. And whether spoken in another sense or in mere passion, depending upon intention, was the subject of evidence, and was fairly sub-

mitted to the jury, who, having found that the words were spoken slanderously, and this court perceiving no sufficient reason for ordering a new trial, the motion is therefore dismissed.

Justices *Colcock, Nott, Gantt* and *Johnson*, concurred.

Hunt & Bennett, for the motion.

———, contra.

PAUL TRAPIER vs. J. L. WILSON.

Under the act of 1791, granting to the Judges of the Court of Common Pleas, the power of determining all questions arising under Caveats, the Judge, for his own satisfaction, may order an issue of facts to be tried by the jury.

The court is not bound to suspend the trial of such an issue, until it is taken to the Constitutional Court, to determine whether it be proper so to direct an issue or not.

A grant located upon a small island, having the general course of the island, and calling for some marks, which could not be found, and for others on the margin of the island, and having a plat with the surveyors certificate appertaining, marked "The North Island," and in different places called "the Island," "the place" was *Held* to include the whole Island.

Tried before Mr. Justice *Richardson*, Georgetown,
April, 1822.

On the day of 1820, *Paul Trapier* entered a caveat to prevent the emanation of a grant for 500 acres of land, upon a location made the 19th day of April, 1820, to *John L. Wilson*, because the said *Paul Trapier* claimed all the said land under a grant to *Daniel* and *Thomas Laroche*, dated the 11th day of May, 1739. Whereupon the following orders were made, "on motion of *Edward P. Simons*, attorney for *John L. Wilson*, the defendant, it is ordered that an issue be made up to ascer-

tain whether the land lying at a place called North Island, and run out for the said defendant, and for which, a grant has been applied, and against which application, a caveat has been entered by *Paul Trapier*, the plaintiff, be vacant land or not."

On motion of Mr. *Simons*, it is ordered, that a rule of survey do issue in this case, directed to *Thomas Skrine*, on the part of the *caveatee*, and one other person, on the part of the *caveator*, to survey the lands in dispute."

An issue was accordingly made up in the form of a wager to determine whether the grant to *Laroche* covered the land located for the defendant.

At April Term, 1822, the defendant objected to the trial of this issue by the jury, which being overruled, the plaintiff adduced the grant to *Laroche*, which described the land as follows, "all that parcel or tract of land, containing eight hundred and fifty-four acres, and butting and bounding to the westward on salt-water marsh partly, and partly on a creek, and south-westward on Winyaw River or Bay, and to the Eastward on the sea, and to the northward on a place called the Basin, near North Inlet."

The plat annexed to the grant, represented the land generally, as set forth in the grant. But on the south-westward, it noticed three specific station trees, i. e. "A casena; an old stump, and a spreading live oak." At the southern termination of this line, the plat called for an old wreck. The southern boundary had neither the course nor distance laid down. The boundary to the east, called for two natural stations, i. e. "The Look Out" and the "Land Hill," and two artificial stations, "a Dead Water Oak," and "two Stumps." At the northern termination of this boundary, it called for a stake. The course of this line appeared to change more or less at every station; but only the general course and distance were given in these words, "The general course is N. E. 12, 332 ch. to the Basin," and the course and distance from the southern termination to the first station, "The Look Out." This line called for the sea-shore, as its boundary eastward.—

On the north, the plat called for the basin, and on the west for salt-water marsh and a creek. On this last side, the plaintiff had located the marsh and taken out grants therefor. Besides the evidence furnished by the grant and plat, it appeared that not one of the specific artificial marks called for had been found, though trees and stumps were seen about the supposed site of the stations, and also many sand hills. It appeared too, that the length of the island was more than a mile, greater than the distance described on the eastern line, and the surplus land 500 acres or more. Old Mr. *Trapier's* house was said to be within the land located for the defendant, and also the light house, the site of which had been granted by this state to the United States.

The question was, whether the grant to *Larboche* covered the whole of the island, except the salt-water marsh, or was it to be located according to the courses and distances set forth in the plat?

The defendant had located the margin of North Island on Winyaw bay to the south westward, and on the sea shore to the eastward. And the south end of the island, all down to low-water marsh.

The jury, according to the opinion of the Judge, found that there was no vacant land as supposed on the part of the defendant, and the Judge then granted the following certificate to the plaintiff.

STATE OF SOUTH-CAROLINA,

Georgetown district.

PAUL TRAPIER vs. JOHN L. WILSON.

In the Common Pleas, April Term, 1822.

Case on a caveat entered by the plaintiff against an application made for a grant by the defendant, viz:

"To his excellency, *Thomas Bennett*, governor and commander in chief in and for the State of South-Carolina. I, *John S. Richardson*, one of the justices of the Court of Common Pleas, in and for the state aforesaid, do hereby certify that on the *caveat* entered in the above case,

between *Paul Trapier* and *John L. Wilson*, an issue was directed by the court to be made up and submitted to a jury, to enquire whether the land on North Island, in Georgetown district, run for the defendant, by *Thomas Skrine*, surveyor, was or was not vacant land, and on the trial of the said issue, at Georgetown, in the district aforesaid, before me, the said *John S. Richardson*, the jury did find for the said *Paul Trapier*, the plaintiff in the said issue, and thereupon, I do hereby certify that the said land run out on the said north island, by the said *Thomas Skrine*, for the said *John L. Wilson*, is not vacant land, and that therefore the *caveat* entered in this case ought to be, and is hereby sustained, and that the grant applied for by the defendant ought not to issue.

In witness whereof, I the said *John S. Richardson* have hereunto set my hand and caused to be affixed the seal of the said Court of Common Pleas, at Georgetown, the eleventh day of April, in the year of our Lord one thousand eight hundred and twenty two, and in the forty sixth year of the sovereignty and independence of the United States of America.”

The defendant moved for a new trial upon the following grounds :

1st. That the case ought not to have been permitted to go to the jury, but under the act of 1791, to have been decided by the Judge alone.

2nd. That when the judge had determined to submit it to the jury, a notice of appeal was tendered, which the defendant's attorney contended ought to suspend the trial of the case before the jury, until a decision of the Constitutional Court, on the right of submitting it to the jury.

3rd. Because the verdict is contrary to law and evidence in this. 1st. The jury departed from the actual closed lines and definite land marks, natural boundaries. 2nd. That the outer lines of the defendant were the inner lines of the plaintiff, for which he sought a grant, and could not be included in the grant under which the plaintiff claims.

Mr. Justice *Richardson* delivered the opinion of the court:

The two grounds relied upon by the counsel were,

1st. That the issue was not for the jury to determine, but for the Judge under the act of 1791.

2nd. That *Laroche's* grant was limited to the specific course and distance called for by the plat, and not by the natural boundaries.

The act of 1791, granting the power of determining questions arising under *caveats* made, is as follows: "And whereas, during the existence of the former constitution, certain powers were given by several acts and resolutions of the legislature, to the governor and council, which powers cannot be now exercised, by reason of the alteration in the executive authority of the state: For remedy whereof, be it enacted, that the Judges of the Court of Common Pleas, or any one of them, in their respective districts, are or is hereby vested with the exercise of the said powers, so far as the same shall extend to hearing and determining of causes in the court of *caveats*, which *caveats* shall be entered as heretofore."

By the terms of the act, the Judge is to decide all causes in the court of *caveats*. But it is not therefore illegal to draw information, upon questions of fact from the jury, "*ad questiones facti respondent juratores.*"

I know of no question turning upon facts, on which the Judge may not direct an issue, in order to obtain the assistance of the jury. In so doing, the court seeks for information, although not absolutely bound by the opinion of the jury. In questions confined to the Judge, such a finding is like that upon an issue out of chancery, not imperative, though of great weight in the decision. But though not of binding authority, is a rational and usual source of information; and is in the true spirit of our system of judicature.

As to the ground, that the case ought to have been suspended until the Appeal Court should have decided, whether the issue ought to have gone to the jury?

This like all motions to continue a cause, was a motion addressed to the discretion of the court.

We come then to the question of location, which was of real importance in the case, and the proper object of the enquiry. If there was any vacant land in the defendants survey, he was entitled to a grant. But was there any vacant land? It is not denied that the land alleged to be vacant, lay within the natural boundaries, called for by the grant to *Laroche*;—that is, it lay between the marsh and creek to the westward; Winyaw River to the south-westward; the Sea to the eastward, and the Basin to the northward. By the description set forth in the grant, the location is plain and unquestionable. The whole island, (unless the marsh be so called,) is clearly within it. But it was urged, that as the plat called for specific stations, as “trees,” “stumps,” a wreck, &c. and in some instances, laid down a precise course and distance from one station to another, we are to be governed by the course and distance thus laid down, which would restrain the limits much within the natural boundaries, and leave to the *caveatee* the vacant land claimed. But such a principle of location has in this case insuperable difficulties. Not a corner or station being found, we have no point of departure, i. e. no beginning or term from which to measure course or distance. Not a single point from which the surveyor was to set out to measure course and distance could be found. For aught that appeared too, the corners and stations, whether natural or artificial, may have been upon the margin of the river, sea, or basin called for, so as to be consistent with the natural boundaries. This probable supposition would also reconcile the plat to the grant, which ought, if possible to be done. Again, the long eastern line of the plat, though continually varying, has only its general course laid down, with the trifling exception, as far as the Look Out. And tho’ it calls for natural and artificial stations, it is a waving line, as if pursuing the water’s edge, and moreover calls for the sea-shore. The plat too is marked thus, “*The North*

Island by a scale of 40." Why use the comprehensive name of "the North Island," if a *part* only were intended to be delineated? The certificate of the surveyor also describes the land as being a place called "North Island, &c." Again, I ask, why this comprehensive term "*a place*," unless in order to signify the whole. "*The Island*," or the "*place*" means the whole island, or place. It was suggested that the word "at" may have been left out, but the original certificate to the plat has no such qualifying preposition, and even were it so, I should deem it but of little weight, opposed as it would be to the other expressions and marks, which concur with the natural boundary, and to the important and satisfactory rule of reconciling the plat to the grant, in order to render the whole consistent in itself. The plat and grant appear then easily reconciled, though at the first glance of the plat alone, one might well conclude, that if a corner or station could be designated, remote from the natural boundary, the course and distance might be taken as the principle of location. But to assume it in this instance, would be to pursue the last rule in geometrical mensuration in place of the first and best, which is to follow the natural and immoveable boundaries, unless the specific and artificial marks fall evidently short of them. Whereas it is only in default of *both, the artificial and natural marks*, that the mere course and distance called for are to govern.— (6 *Mass. Rep.* 131, 252. 15 *Johnson*, 447. 12 *Do.* 252. 4 *Hen. & Mum.* 130. 4 *Wheaton*, 444. 6 *Cranch*, 237. 3 *Dallas*, 436.) For my part I have no conception of a correct location of land, by course and distance, *where there is no terminus a quo*. Where there is no station or corner found, it becomes absolutely necessary to resort to boundaries, and even to the boundaries of surrounding lands, in order to locate the tract calling for them. In the case before us, the surveyor must have assumed some point, and he seems to have fixed on that where the Cassena stood, assuming that it stood remote from the river. But at this late day, why not, when it is consistent

too with the natural boundary, suppose the Cassena to have stood upon the verge of the shore, so as to render it consistent with the boundaries required by the grant.—Assuredly surplus land being found, is of little consequence ; for the quantity of land is whatever is contained within the true boundaries ; and the end of the location is to fix the boundaries, which being done, the quantity follows, being the contents within them. The notice in the plat of the number of acres is in fact but an expression in the general description, and is very seldom put down with accuracy. Upon a near inspection then (for it is seldom that the location of land depends so little upon extrinsic evidence) it is satisfactorily evident, both from the plat as well as the grant, that no part of the 500 acres contained in the defendants survey was vacant land.

The motion is therefore dismissed.

Justices *Colcock*, *Nott* and *Johnson*, concurred.

Gantt, Justice :

The question in this case being, whether under the Act of Assembly, the Judge was alone authorized to decide on a question of *caveat*. On that question, I think the course pursued was illegal, therefore dissent from this opinion.

Simons, for the motion.

——— contra.

S. DAVENPORT & Co. vs. RILEY & O'HEAR.

Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal, and may bring an action on a breach of warranty.

IN the City Court, April Term, 1822.—Process to recover \$ 57, the difference between the value of sound and damaged cotton.

The report of the Recorder.

The fact of the damage and of the quantum of the inju-

ry, were clearly proved. It was further shewn by a witness for the plaintiffs, that the cotton was purchased from the defendants, who were well known to be factors in Charleston ; that when the defendants were informed by the witness that the cotton was damaged, they said that it belonged to a planter, and not to them, they having sold it as factors. The sales were made out in the manner which is customary with factors, and the bags were stated in the bill to be marked L ; previously to bringing the suit, the attorney of the plaintiffs wrote a letter to the defendants, who, in their answer to it, replied that the cotton was the property of a Mr. *Lapeine*, in King street, and that they had disposed of it as factors. The plaintiff's counsel insisted, that as the defendants had sold without disclosing the name of their principal, they were personally responsible.

The defendants contended that the sale having been made by them in their character of factors, the principal was exclusively liable. I decreed for the defendants, upon the ground that it was manifest that the sale had been made by them as factors, consequently, that they could not be rendered individually liable, unless they had entered into some special assumpsit or undertaking. Notice was served upon me that a new trial would be moved for upon the grounds which are enclosed.

WM. DRAYTON, Recorder.

Mr. Justice *Richardson* delivered the opinion of the court :

In the case of *Rabone vs. Williams*, (7 Term 356,) Lord *Mansfield* says, " where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal ; and though the real principal may bring an action, yet the purchaser may set off any claim he may have against the factor." This has been long settled. In the case of *Mauri vs. Heffernan*, (13 Johnson, 58,) it is decided,

that to excuse the agent, he should have communicated his agency. See also *Strange*, 1182, and 2 *Campbell*, 24 and 341, where the same rule is fully recognized.— Without such a rule, the opportunity of committing frauds would be infinite, and the greatest caution in contracts, utterly vain. For instance, a country trader, who had purchased goods of a respectable and responsible merchant, upon discovering that they were unsound, might be turned over for his remedy to an unknown foreigner. A citizen who purchased a horse in the same situation, might be sent to Kentucky for the restoration of his money, tho' he had contracted with a livery stable keeper, resident here. A foreign trader who has purchased our produce, upon the character of an established factor, or other vendor of known responsibility, might be referred to an insolvent debtor.

It cannot be doubted that strangers coming to purchase of us, will not only deal more readily, but give even higher prices to known factors, because of their responsibility. And such a reliance is a part of the contract, not to be trifled with. The rule then, that every man is liable upon his own contracts, unless he let the opposite party know that he is a mere agent for another, must be preserved. Men depend upon those with whom the contract is made ; and are not to be supposed as confiding in mere strangers. To say that the authority of a factors employment is of itself notice to a purchaser, would be too unsafe. Factors of every description often sell for themselves. With our factors, selling rice or cotton, it is often that they are the planters, and may be speculators in the produce too.

The motion therefore is granted.

Dunkin & Campbell, for the motion.

Hamilton & Petigru, contra.

JULIUS TAVEL vs. JOHN BARRE.

Where a garnishee omits in his return to state what goods, &c. may be in his "power," as well as possession, &c. the attacking creditor should make his exceptions to such return by suggestions, and not file a declaration against the garnishee as if no return had been made.

Tried, October Term, 1821.

MR. SARGEANT made the following motion : " On motion of the plaintiffs attorney, it is ordered that he have leave to file a declaration against *Thomas Middleton*, garnishee," which motion was refused by the presiding Judge. The case was, that *William F. Shackelford* and *Thomas Middleton* were copartners, during which, as it is said, *John Barre* placed certain wine in their hands and departed from the state. Thereupon, *Julius Tavel* applied for an attachment, and served each partner with a copy of the writ of attachment, upon which, *Shackelford* made default, but *Middleton* returned that he had nothing in his hands or possession, but omitted the word "power." This return, under the present act, (*Pub. Laws, page 187,*) in which the word *power* is introduced, the plaintiff contended was insufficient; for although he may have nothing "in hands or possession," yet, he may have something in his power, as a partner in the said factorage business, which may be proper matter for a jury to try. A declaration was presented to the clerk to be filed in order to put *Middleton* to plead. But the clerk refused to file it. Leave was then asked in open court, as above mentioned, and refused. The plaintiff therefore prayed this court to reverse the decision.

Mr. Justice *Richardson* delivered the opinion of the court :

The act requires the garnishee to return whatever may be in his "possession or power" belonging to the absent debtor. The declaration offered to the clerk, consisted

of the usual count, &c. stating the total default of the garnishee, and praying judgment against him. Such a proceeding could have no application to this case. If the return of *Middleton* wanted the word "power," either the filing should have been opposed or upon the insufficiency, a rule taken to shew cause why he should not amend the return. Or if it was intended to charge him with having the wine within his power, a suggestion on oath, specifying the *articles*, and charging him with a false return, and requiring his further return, as it regards *them*, might have led to the proper issue; to be shaped according to the particular occasion and state of facts, as they eventually should appear. But the declaration, as it is called, is predicated upon the supposition of a total default in the garnishee, which default does not appear by the mere omission of the word "power." The return possibly may be voidable, but certainly it is not void.

The motion is therefore dismissed.

Justices *Colcock* and *Johnson*, concurred.

Nott, Justice :

I concur in this opinion, except as to that part which relates to a rule on a garnishee to amend his return, on which, I give no opinion.

Gantt, Justice :

The return was either good or not in law. If insufficient, then the plaintiff was entitled to his judgment by default. It was a favour to the garnishee to allow him to plead, and the motion should prevail.

Sargent, for the motion

~~_____~~, contra.

CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, NOVEMBER TERM, 1822—COLUMBIA.

JUSTICES PRESENT THIS TERM.

ABRAHAM NOTT,

DAVID JOHNSON,

CHARLES J. COLCOCK,

DANIEL ELLIOTT HUGER,

RICHARD GANTT,

JOHN S. RICHARDSON,

JAMES WILLIAMS *vs.* BARWELL EVANS.

The court has, at common law, the power to order mutual judgments to be set off against each other; but a person should avail himself of the earliest opportunity to make such application, and not to delay before the interest of third persons have become involved.

Where the plaintiffs, under particular circumstances, took the defendant with a *ca. sa.* the court refused his motion to set off their mutual judgments.

TRIED before Mr. Justice *Gantt*, Camden, Fall Term, 1822.

James Williams, the plaintiff in this motion, had obtained a judgment against *Barwell Evans* for one hundred and eighty-eight dollars; subsequent thereto, *Barwell Evans* obtained a judgment against the said *James Williams*, for the sum of two hundred and forty dollars, in an action of Trover. *Williams*, instead of moving to have his judgment set off against the larger judgment which had been recovered against him, issued a *capias ad satisfaciendum* against *Evans*. After the *ca. sa.* was

issued against him, he assigned his judgment to Colonel *Nixon* for a valuable consideration ; *Evans* was taken on the *ca. sa.* and put into gaol, where he remained until he died. At the next succeeding court, *Williams* moved to have his judgment set off against that obtained against him by *Evans*.

The presiding Judge ordered the set off to be made.

This was a motion to rescind that order.

Mr. Justice *Nott* delivered the opinion of the court :

There is no doubt but that the court has the power to order mutual judgments to be set off against each other. This is a common law power, and is not derived from the act authorizing parties to set off mutual debts. Lord *Kenyon* says, it depends on the general jurisdiction of the court over the suitors in it, and is an equitable part of their jurisdiction, and has been frequently exercised, (*Mitchell vs. Oldfield*, 4 Term Rep. 123. *Montague On Set Off*, 5, 6. 1 *H. Blackstone*, 217. 2 *Sellon's Practice*, 451.) If it constitute a part of the equitable jurisdiction of the court, it ought to be so exercised as to do equity, and not to sanction fraud, and a person who wishes to have the benefit of it ought to avail himself of the earliest opportunity to make his application, and not to delay until the interest of third persons have become involved. If the party in this case had made his application at the court when his judgment was obtained, it ought to have been granted. He had three methods of proceeding, one that which he is now endeavoring to pursue ; another by *fi. fa.* against the goods of the defendant ; and the third, by taking his body in execution. He chose the latter, and after having made his election, (and particularly under the circumstances of this case,) he ought to be bound by it ; at least he can have no high claim to the assistance of this court to relieve him from the difficulty of his own voluntary creation. It is true a judgment is not a negotiable instrument, nevertheless an assignment conveys an equitable interest to the assignee, such as a court of law

will notice and respect, in all cases of appeal to its discretion. (*Norman vs. Crocker*, 1 Bay, 246.) A bond is not negotiable, and yet this court would so far respect the assignee of one as not to prevent a judgment recovered upon it to be set off against one recovered against the obligee. The plaintiff by taking the body of the defendant, had voluntarily relinquished every other claim upon him, and the claim which he now has upon his property, is revived only by the accidental circumstance of his death.— Suppose the assignee of this judgment had enforced an execution against *Williams* in the life time of *Evans*, and during the time he had his body in execution, could *Williams* have required that money while in the hands of the sheriff, to be paid over to him? Certainly not; because having taken the body in execution, he must have been contented with it—he could not have a double satisfaction. A releasement of *Evans* from custody, would have been a release of the debt. He had a mild and easy method of enforcing the payment of his debt, if he had chosen to make use of it. Instead of which, he resorted to the most rigorous and unfeeling, known to the law; like another *Shylock*, he would have nothing short of his flesh, and having no longer the means of gratifying his vengeance, he now comes and asks this court to take from a humane and merciful creditor a vested right to satisfy a debt which he had it in his power to receive, and which he voluntarily relinquished to gratify a vindictive passion.

The motion must be granted.

Justices *Richardson & Colcock*, concurred.

Levy & McWillie, for the motion.

J. C. Carter, contra.

JOHN W. WILKINS vs. AINSLEY HALL and WILLIAM HALL.

An action of *Trespass* for false imprisonment under a *ca. sa.* can not be

supported as long as the execution on its face, remains unsatisfied, (a) or even where there is but cost due.

THIS was an action of trespass for false imprisonment, in maliciously causing the plaintiff to be arrested on a *ca. sa.* The defendants had obtained a judgment in the Common Pleas, against the plaintiff in this action, and subsequently, about February, 1821, the defendant, *A. Hall*, entered into an agreement with the plaintiff, by which, he was to allow him one and two years to pay the money. The consideration for this arrangement, was that Mr. *Barrett*, who had purchased a house and lot of *Wilkins*, in Columbia, sold at sheriff's sale, at \$6.100, had relinquished his bargain in favour of the defendant, and it was agreed that the defendant should hold it as security, as well for the price paid, as for the debt due by the plaintiff to the defendant. The plaintiff was to have two years to pay the money, in equal annual instalments, and if it became necessary to sell the house and lot, and it should bring a larger sum, the surplus was to be settled on the plaintiff's wife, &c. A written agreement was prepared and tendered to the defendant, which he refused to sign, as some difference took place between the parties about the terms of it, and the defendant, *Wm. Hall*, in the absence of *A. Hall*, and so far as appeared from the evidence, without his knowledge or consent, directed a *ca. sa.* to be issued against the plaintiff, on which he was arrested by the sheriff, on the 17th of May following, and was confined to the prison bounds, until the 23rd of June, when he was discharged by an order from the Court of Equity, growing out of a bill for an injunction to stay proceedings at law. The sheriff, who made the arrest, stated that he never laid his hands on the plaintiff, at the time of the arrest; that he met him in the street and informed him that he had the *ca. sa.* and he requested permission to go in pursuit of a friend to be his security, to keep the prison bounds; that he came shortly after to his office, and with

his friend, entered into the usual bond, and never was within the prison walls.

A. Hall returned home before the plaintiff was discharged from the prison bounds, but it did not appear that he took any part in the transaction.

When the plaintiff closed his evidence, a motion was made for a nonsuit on the following grounds :

1st. That the action of trespass would not lie, in as much as no actual force on the person of the plaintiff had been used in making the arrest.

2nd. That the arrest was justifiable, as the costs were unpaid, and were not nor could be included in the agreement to give time for payment of the judgment.

3rd. That the plaintiff's judgment being unsatisfied and in full force, gave him a legal right to arrest the defendant on *ca. sa.* notwithstanding the supposed agreement to give time for payment, and if the violation of good faith as respected the agreement, was the foundation of an action, the remedy was by action on the case, and not trespass *vi et armis*.

The court was of opinion with the defendant on the two last grounds, and non-suited the plaintiff.

This was a motion to set aside the non-suit.

Mr. Justice *Nott* delivered the opinion of the court :

It might be sufficient in this case to say, that the costs being due, would protect the defendants from an action of false imprisonment for causing the plaintiff to be arrested on the *ca. sa.*—but they stand on much stronger ground. The whole debt remained unsatisfied. Some stipulation had been proposed between the parties, by which it was agreed that the execution should be stayed ; but it was a mere secret contract without any consideration that we can see, and the precise terms of which we do not know. It appears not to have been closed, because the parties differed about the terms of it—it certainly could not operate as a discharge of the execution. If the defendants had been guilty of a breach of faith, or of a breach of

contract, they might have been liable to some other action. But they could not be liable to an action of false imprisonment, as long as the judgment and execution remained unsatisfied.

The defendants appear to me to be equally justifiable upon moral as well as legal principles. The plaintiff's house had been sold—he was for ever divested of it, if the purchaser had been disposed to have kept it, and probably would have done so, if the defendants had not stepped in to the plaintiff's relief. They agreed to advance the money for him, to take the house as security for that and their own debt, and to give him two years to pay the money, but when a written agreement was tendered, he refused to sign it: whether that agreement was in conformity with the verbal contract, does not appear—but it at least appears that the bargain had not been finally concluded; the defendants then had no alternative but to proceed with their execution.

The motion therefore must be refused.

Justices *Johnson*, *Huger* and *Richardson*, concurred.

Levy & Chappell, for the motion.

McCord & Gregg, contra.

(a.) See *Reynolds vs. Corp*, 3 *Caines' Rep.* 269,

R.

JOHN BOYCE vs. FANNY OWENS.

A promise by A. to B. that if B. would discontinue an attachment against C. that he A. would pay B. the debt, is void, under the statute of frauds, not being in writing.

A domestic attachment, it seems, cannot be levied on land.

TRIED at Newberry, at a Special Court, July, 1822,
before Mr. Justice *Gantt*.

This was an action brought against the defendant, on a promise to pay a debt which her son *Moorefield Owens* owed to the plaintiff. It appeared in evidence that the plaintiff held a note on *Moorefield Owens* for \$87. Being apprehensive that he was absconding, so that the ordinary process of law could not be served upon him—he applied to a magistrate, and obtained an attachment against his estate for that sum. The attachment was directed to one *Jones*, a constable, and to any other constable. It was levied on a tract of land, and the defendant *Funny Owens*, was summoned as a garnishee. Whether the attachment was ever returned or not, did not appear. Mrs. *Owens* however agreed with the plaintiff, that if he would discontinue his attachment, and wait with her until next fall, she would pay the debt. The attachment therefore was not prosecuted any further, but the promise was not in writing, nor did it appear that the note was given up.

Upon this evidence, the defendant moved for a non-suit in the court below, upon two grounds :

1st. Because the promise was without any consideration.

2d. Because it was to pay the debt of a third person, and was not in writing.

That motion was overruled, and the plaintiff obtained a verdict.

This was a motion for a non-suit or new trial, on the same grounds.

Mr. Justice *Nott* delivered the opinion of the court :

There is no statute perhaps which has given rise to more nice and subtle distinctions than those which have arisen upon the construction of the statute of frauds. Two things however appear to be very well settled :

1st. That to make a person liable upon a promise to pay the debts of another, that promise must be founded upon some consideration, and,

2d. That it must be in writing.

Some consideration was necessary for the support of

every contract at common law ; and it was not the intention of the statute to alter the common law in that respect, but to superadd another requisite ; to-wit, that the promise should be in writing.

But it is contended in this case, that the discontinuance of the attachment, and giving time to the defendant, constituted a new consideration, moving from the plaintiff to the defendant, which made this an original undertaking, that need not be in writing. Such a construction, it appears to me, would almost amount to a repeal of the statute. A promise to pay the debt of a third person, was not good at common law, unless it had been on some consideration. And if the circumstance of the promise having been founded on a consideration, be sufficient to take it out of the statute, the law is precisely the same now as it was before the statute was passed ; and one of the most important statutes in our law-books, has, by construction, become a dead letter. In *Comyn on Contracts*, 55, it is said, “if it be a part of the agreement that the original debt be discharged, that is a sufficient consideration to support the undertaking of another to pay the debt, and the agreement need not be in writing.” The reason appears to be obvious. The original debt being extinguished, it is no longer an undertaking to pay the debt of another, because there is no such debt existing, but it is a newly created debt of the undertaker. “But if no such stipulation be made, and the original debt be permitted to subsist, the undertaking is merely collateral, and the agreement must be in writing.” There was no evidence in this case that the original debt was discharged. The note was not given up, nor the relative situation of the parties in any manner changed. It is also further laid down in the same author, that “when nothing more is stipulated for, than indulgence to the debtor, or that an action which has been commenced shall be stayed, the undertaking to pay the debt of a third person is within the statute ; for the original debt still continues, and the undertaking is but collateral.” (1 *Comyn on Contracts*,

60.) That seems to be the very case before us. The consideration, and the only consideration laid in the declaration, is the staying of the attachment. So where a creditor discharges a lien, on which he has the goods of his debtor, where a person promises to pay the debt of another on the faith of funds in his possession, it is considered an original undertaking—the goods in such case are the fund, and the person becomes liable in consideration of that security. (*Williams vs. Lesser. Do. 61. 3 Burr. 1886. 2 Wils. 308,*) and that is consistent with our own decisions on the subject. In the case of *Thomas McCray ads. Jno. Madden, (1 McCord, 487.)* Mr. Justice Gantt, who delivered the opinion of the court, observes, “whether the promise made in this case is to be considered as a collateral one, and void by the statute of frauds, will depend upon the fact of the defendant *having effects in his hands* at the time of the promise to pay the debt due by this note from the absent debtor to the plaintiff.” In that case, the defendant had said, that “if the plaintiff would not take out an attachment, but would wait until the next Fall, he would pay the amount due by the note, *as he had effects in his hands for that purpose.*” The case of *Atkinson vs. Barfield*, was decided upon the same principle. The plaintiff had levied an attachment upon a horse; the defendant promised that if he would give up the horse, he would pay the debt. (*1 McCord, 575.*) This case is therefore clearly within the statute, and the promise void. Indeed, there was no consideration even to support an original undertaking. The attachment was for eighty-seven dollars; it was directed to one *Jones*, a constable, or to any other constable. Now our act expressly declares, that an attachment for that amount shall be directed to the sheriff. A constable is not authorized to serve an attachment for any sum above twenty pounds; neither could a domestic attachment as this was, be levied on land. The attachment, therefore, in its creation, was void, and the service would have been void, if the attachment had been good. The plaintiff therefore

had no lien ; he had not even commenced an action—the whole proceeding was illegal and void, and did not furnish a sufficient consideration to support a contract.

The motion for a non-suit must therefore be granted.

Justices *Huger*, *Johnson* and *Colcock*, concurred.

O'Neal & Johnson, for the motion.

Bauskett & Dunlap, contra.

Ex'ors of GLENN vs. McCULLOUGH.

Proof of a promise made to an executor will not support an allegation of a promise to a testator.

ASSUMPSIT.—Tried before Mr. Justice *Nott*, at Laurens, Fall Term, 1822.

This was an action on a promissory note. The promise was alleged to have been made to the testator. The defendant pleaded the statute of limitations, to which the plaintiff replied a subsequent promise. It appeared in evidence, that after the death of the testator, the executor presented the note to the defendant. He said he gave the note, and would not take the advantage of the statute of limitations ; but that it was given for rotten tobacco.

The judge on the circuit, instructed the jury that the acknowledgment made to the executor was sufficient to save the case from the statute of limitations ; but that a promise to an executor would not support an action on a promise made to his testator ; the evidence did not support the issue, and the plaintiff could not recover.

The plaintiff's counsel then moved for leave to withdraw his record from the jury and amend his declaration, by laying a promise to the executor. The presiding judge was of opinion he had no authority to give such

leave without the consent of the opposite party, which was not obtained. The plaintiff then suffered a non-suit. This was a motion to set aside the non-suit, and for leave to amend the declaration, if the court should be of opinion that an amendment was necessary.

Mr. Justice *Nott* delivered the opinion of the court :

One of the first rules of pleading is, that the proof must correspond with the allegations. To allege one thing and prove another, would be as far from leading to any conclusion in law as in logic. A person comes into court, prepared only to defend himself against the particular charge alleged against him ; and that principle pervades all description of cases, whether criminal or civil. Life and property would be equally insecure, were there any other rule to prevail. Proof of a promise therefore made to an executor, does not support the allegations of a promise to his testator. The authorities are so numerous and strong, that they preclude all reasoning on the subject.— The case of *Dean & Crane*, (1 *Salk.* 23,) is directly in point. The plaintiff declared as executor on a promise to testator. The defendant pleaded *non assumpsit infra sex annos*, and upon the trial of the issue, it appeared that there was a new promise made within six years, but it was a promise made to the plaintiff himself, and not to the testator : *et per curiam*—he should have declared accordingly. (See also *Green & Crane*, 2 *Lord Ray.* 110. *Jones, et. al. Ex'ors of Vester vs. Moor, Administrator of Gray*, 5 *Binney*, 573. *Ballantine On Lim.* 189. *Sarell, Adm'r vs. Wine*, 3 *East*, 408.)

With regard to the amendment of the declaration, this court concurs with the presiding Judge that the motion came too late after the cause had gone to the jury ; and this court has not been in the habit of reversing the order or decision of the court below, where it was correct. If there had been any ground on which the cause could have been sent back, it is probable the motion to amend

might have been granted ; but, under the circumstances of this case, both motions must be refused.

Justices *Johnson, Huger, Gantt, Richardson* and *Colcock*, concurred.

O'Neal & Irby, for the motion.

Downs, contra.

GEORGE LIGHTNER *ads.* MICAHAH MARTIN.

Where the *bearer* of a note brings an action against the maker who sets up a breach of warranty, on account of unsoundness in the property bought, the declarations of the *payee* are inadmissible.

The person who sold a negro to the payee a few months previous to the same being sold to the maker, is a competent witness in an action by the bearer against the maker, to prove the soundness at the time he sold her.

A. sold B. a negro slave, and B. being sued for the purchase money, by a bearer of the note to whom it had been transferred, set up a breach of implied warranty of the soundness of the slave, and proved that she had the venereal disease ; the court *held* that it was inadmissible to prove, in order to enhance the damages, that she had communicated the disease to many other slaves, by which he received great consequential injury, it not having been proved that the vendor knew of the unsoundness at the time of sale.

THIS was an action on a promissory note, payable to one *Wooley*, or bearer, for \$1500, of which there remained due a balance of \$350 ; the note had been passed to the plaintiff by delivery after it became due ; the defence was that it was given for the price of three negroes, one of which (*Rose*,) it was alleged had the venereal disease at the time of the sale. The defendant offered to give in evidence, the declaration of *Wooley*, that the defendant had supplied him with funds to purchase the negroes, and that they were to divide the profits : That evidence was not admitted by the presiding Judge.

One *Williams*, who sold the negro to *Wooley* about three months before, was offered by the defendant to prove that she was sound at that time. This witness was objected to, but was admitted by the court.

The defendant then offered to prove that this woman had communicated the disease to others of his negroes, by which he had incurred great losses and expense : That evidence was rejected by the court, unless it was made to appear that the plaintiff knew that she was diseased at the time of the sale, of which there was no proof. The defendant put her under the care of a physician, and after having gone through a course of medicine, she appeared to have got quite well. At length he determined to sell her, and sent her off for that purpose. The agent had not returned, and whether her health was perfectly restored, or whether she had been sold, was not known.

The presiding judge instructed the jury that the defendant was entitled to a deduction for the actual injury sustained, which consisted of loss of labour, expences of her support, care, &c. That they ought not to enter into any calculation as to the possible injury which he might have sustained, the evidence of which had been excluded.

The jury found a verdict of two hundred dollars, making an abatement of \$ 154, on account of the unsoundness of the negro.

This was a motion for a new trial, on the following grounds :

1st. Because the presiding judge rejected the declarations of *Wooley*, the payee of the note.

2d. Because the testimony of *Williams*, from whom *Wooley* purchased the negro, was allowed.

3d. Because the evidence of consequential damages was rejected.

4th. Because the presiding judge misdirected the jury, in charging them that they should allow no abatement except for the actual loss, positively proved to have been sustained by the defendant.

Mr. Justice *Nott* delivered the opinion of the court :

I concur in opinion with the presiding judge below on all the grounds made in this case. The declarations of the payee in relation to the interest of the present plaintiff, were properly rejected. This case does not come within the principle involved in the case of *Jordan & Lashbrook* (7 Term Rep. 601.) In that case, the question was whether the indorsee of a note could be a witness to impeach its validity, and not whether his declarations might be given in evidence? It appears to me that the payee might have been a witness, but his declarations certainly could not be received.

2d. I am as well satisfied that the testimony of *Williams* was properly admitted ; that question already has been decided by this court. (*Duncan et. al. ads. Bell et. al.* 2 *Nott & McCord*, 153. 5 *Espinasse Rep.* 100, *Briggs vs. Lekeek.*)

The negro may have been sound when *Williams* sold her, and became diseased after she came to the hands of the present plaintiff. A disease may be of such a nature, and two sales in succession so nearly co-temporaneous, that proving the property to be unsound in the hands of the latter, would furnish pretty conclusive evidence that it must have been so in the hands of a former seller. In such case, perhaps, his testimony ought to be rejected ; but unless his interest is made to appear, the objection can only go to his credit, and not to his competency.

3d. The defence of unsoundness of property, which is allowed to be set up against a note of hand or bond, is usually, but I think improperly, considered as a set off. A set off, means a counter demand which the defendant has against the plaintiff ; and although one set off case is very comprehensive in its terms, (embracing any cause, matter or thing,) yet it has always been restricted in its construction to demands arising on contract. Damages arising from slander, assault and battery, deceit, and other cases sounding merely in damages, have never been considered the subjects of set off ; and although a demand, arising

from the unsoundness of property, is bottomed on an implied warranty, which partakes of the nature of a contract, yet such a defence has never been allowed, except where it had relation to the property which constituted the consideration of the plaintiff's demand, and then the object is rather to defeat the plaintiff's action, on the ground of a failure of consideration, than to recover from him on the ground of contract: though if the money has been paid, and there is a total failure of consideration, or the contract be rescinded, the defendant may recover from the plaintiff, the money so paid; but I have never known it allowed, where the claim was for consequential damages, or in a case partaking of the nature of a tort.

And much less can it be allowed in this case, where the action is brought by the bearer of the note, and not the payee. The plaintiff is a stranger to the transaction, and cannot be answerable for damages occasioned by the fraud or misrepresentation of the vendor, or to refund money paid by him.

4th. I think the defendant has no cause of complaint on the last ground; if there was any error in the opinion of the court, it was in being too favorable to the defendant. He had sent away the negro for sale—she then appeared well. Whether she continued so or not, did not appear. He therefore could have no claim on the ground of unsoundness at that time. Whether he was entitled to an abatement on account of the loss of labor, expenses, &c. is at least questionable. I have been always under an impression, that to establish a breach of an implied warranty of soundness, there must be evidence of a fixed permanent disease, which went to impair the intrinsic value of the property. (*Garment vs. Bans*, 2 *Espinasse Rep.* 673.) Would a defective tooth, by which a negro might be laid up a few days with a tooth ache, or subject the purchaser to the expense of having it extracted, be a breach of such warranty? Or even a fever, or any other temporary complaint, by which he should lose his services for several weeks, and incur the expenses of a

doctor's bill? If every such case is to furnish a cause of action, we have an ample field of litigation opening to our view which has been hitherto unexplored.

But however that may be, the defendant in this case has no ground for a new trial, and the motion must therefore be refused.

Justices *Huger, Richardson, Johnson* and *Colcock*, concurred.

Gregg, for the motion.

McCord & Stark, contra.

JAMES K. DOUGLASS vs. ALLEN JONES DAVIE.

Except where an action is on an instrument which carries on its face the evidence of consideration, it must be averred in the declaration, and proved.

The mere acknowledgment of a debt, without mentioning any particular amount, will not authorize a jury to give a verdict for a specific sum.

But where the defendant in a note to the plaintiff, "calculated that four bales of cotton would pay the amount" due, accompanied with an order on his agent, to deliver to the plaintiff "the cotton he (defendant) had won at the Camden man;" the court held that the jury might, upon such evidence give a verdict for the amount of four bales of cotton, or that parol evidence might have been given to show how much cotton the defendant had won at Camden, and a verdict for that amount would have been good.

ASSUMPSIT—Tried before Mr. Justice *Johnson*, Fall Term, 1822.

The declaration contained three counts—one on an order, a copy of which is given below. One on an account stated for goods sold and delivered, and one for money had and received. The plaintiff produced in evidence, a letter from the defendant to himself, in the following words—"Mr. *James K. Douglass*, your favor by Mr.

Canty, was handed me a few days since, and according to your request, annexed you have an order for the cotton, which I supposed was delivered you long since, and I calculated that four bales would pay the amount.— Please advise me when you receive it, and direct to Huntsville, Madison, M. T.

Signed,

A. J. DAVIE.

At the bottom of this letter was the following order :

H. A. Davie,

You will have delivered to Mr. *J. R. Douglass*, or order, my cotton, won on the Camden main.

Signed,

A. J. DAVIE.

There were other letters from the defendant, desiring the plaintiff to forward to him the amount of his account, &c. and acknowledging that he was indebted to him without mentioning any specified amount.

The presiding judge was of opinion that the plaintiff could not recover on the first count, because there was no consideration averred in the declaration, and that he could not recover on the other counts, because there was no specified sum acknowledged or proved to be due ; and also, that the order could not be given in evidence to support the other counts in the declaration.

The plaintiff suffered a non-suit, and this was a motion to set that non-suit aside, on the ground that the evidence offered ought to have been submitted to the jury.

Mr. Justice *Nott* delivered the opinion of the court :

Every contract must be founded on a good or valuable consideration, and except when the action is on an instrument which carries on its face the evidence of consideration, it must be averred in the declaration and proved.— This order is not an instrument of that description. The plaintiff therefore could not recover on the first count.— (*Carlos vs. Fanconet*, 5 D. & E. 482. *Lansing vs. McKillip*, 3 Caines, 286. *Jerome vs. Whitney*, 7 Johnson, 321. *Gains vs. Hendrick*, 2 Const. Rep. 339.)

I also concur with the presiding judge, that independent

of the draft, and the letter accompanying it, there was no evidence to authorize a verdict for the plaintiff. The bare acknowledgment of a debt, without mentioning any particular amount, will not authorize a jury to give a verdict for a specific sum. (*Harrison, &c. vs. Wm. McKenney, 2 Bay, 412.*) But I think that the defendant's letter to the plaintiff, stating that he "calculated that four bales would pay the amount, accompanied with an order to his brother to deliver to him his cotton won on the Camden main, might be fairly construed into an acknowledgment that he owed the plaintiff the amount of four bales of cotton, whatever their value might be, and ought to have been submitted to the jury in support of the account stated. And even if that evidence had been insufficient, the deficiency might have been supplied by offering parol proof of the quantity of cotton won on the Camden main.

The non-suit therefore ought not to have been granted, and the motion to set it aside must prevail.

Justices *Huger, Gantt, Richardson* and *Colcock*, concurred.

Clarke, for the motion.

Williams, contra.

JOHN POWER vs. CHARLES MILLER.

Words charging a person with perjury or subornation of perjury are not actionable, unless it appear by a *colloquium*, or by the words themselves, that they had reference to an oath taken in the course of a judicial proceeding.

Tried at Abbeville, Fall Term, 1822.

THIS was an action of slander brought against the defendant for charging the plaintiff with subornation of perjury. The words laid in the declaration were as follows,

“whereas the said *John Power* obtained the testimony of one *Dabney D. Wilkinson*, by affidavit, before a judicial officer, duly qualified to administer such oath,” the said *Charles Miller* intending to injure, &c. “falsely and maliciously spoke and published of and concerning the affidavit and testimony so obtained as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say ; he (meaning the said *Dabney D. Wilkinson*,) had sworn falsely, but that he did not blame him for it, for he was induced to do it by *John Power*.”

The declaration further contained the necessary inuendoes with regard to the meaning of the words, &c. but contained no *colloquium* by which it could be seen that he referred to any judicial proceedings.

A Mr. *Dobbs*, before whom the affidavit was made, was called as a witness ; he swore that the defendant asked him if *Wilkinson* had sworn to such an affidavit before him. He informed him he had. He then replied in the words above mentioned. It did not appear from the testimony that the affidavit was taken in any judicial proceeding or for any judicial purpose. The plaintiff said when he procured the affidavit to be taken, that it was intended as the foundation of an action, but of what action or how it was to be applied, did not appear.

The plaintiff having closed his evidence, a motion was made for a nonsuit, on the ground that the words as laid in the declaration and proved did not amount to a charge of perjury, and therefore was not actionable.

The presiding Judge being of that opinion, granted the motion.

This was a motion to set aside that nonsuit.

Mr. Justice *Nott* delivered the opinion of the court :

To constitute slander, the words alleged to have been spoken, must import some disgraceful act, which, if true, would subject the person of whom they are spoken to legal punishment. If they import a crime, no *colloquium* need be set out ; because it would show nothing more than the

words themselves imply. But to say a person is foresworn, or has sworn falsely is not actionable, because it may be a mere voluntary oath, which would not constitute perjury. It is necessary, therefore, in such cases, to set out the *colloquium* that it may be seen that they related to an oath taken in some judicial proceeding. For unless that appears either from the words themselves or can be inferred from the manner of speaking them, no action lies. (*Holt vs. Scholefield*, 6 Bacon, Slander, B-6. Term Rep. 691.) So when words otherwise actionable, are explained at the time by reference to a known and particular transaction, they are to be construed accordingly, and being so explained, are not actionable. (1 *Johnsons Cases*, 279.) The words in that case were “*John Keating* is as damned a rascal as ever lived, and all who joined his party, and the procession on the 4th of July, are a set of black hearted highwaymen, robbers and murderers. Yet when it appeared that they were spoken with reference to a particular transaction, which shewed that the persons spoken of had not been guilty of the crimes alleged, they were held not to be actionable. So in the case of *Stewart vs. McDowall*, in Charleston, where the defendant said the plaintiff had robbed him of his money ; it was held that the action could not be maintained because the words were spoken with reference to a certain monied transaction between the parties, in which the defendant thought he had been defrauded by the plaintiff, and gave expression to his feelings in those harsh terms. In the case of *Ashbell & Wit*, (2 *Nott & McCord*, 364,) it was held that these words, “he swore a damned lie before squire *Lamkin*, and that the plaintiff was foresworn, and that he, the defendant, would overthrow his oath so that it should never hurt a negro,” were not actionable. The declaration contained a *colloquium*, stating that the words were spoken with reference to a certain judicial proceeding, before one squire *Lamkin*, but as the *colloquium* was not proved, the court held that the action could not be maintained. Now what is the allegation in this declaration ? why that the “said

hscw/

John Power obtained the testimony of one *Dabney D. Wilkinson* by affidavit, before a judicial officer duly qualified to administer such oath." It is not alleged that it was taken in any judicial proceeding, or that it was intended to be used for any judicial purpose. Neither did the testimony establish any such fact. It is contended that the plaintiff said at the time, that it was intended as the foundation of an action, but the declarations of the plaintiff were not evidence of that fact; neither could the fact itself, if proved, have availed the plaintiff unless it had appeared on the proceedings, and even then it is probable that it would have been considered too indefinite and uncertain, and if there was no charge of perjury against *Wilkinson*, there was none of subornation of perjury against *Power*. Several cases from *Croke's Reports* have been relied on in support of this declaration, but by a reference to those cases, it will be found that the technical word perjury, has been made use of, or the oath is said to have been taken in court or to appear on record or in some other way, to shew that it was taken in a judicial proceeding. (*Dixon vs. Harris*, *Cro. Ja.* 158. *Cro. Charles*, 337, *Anonymous. Do.* 509, *Ceety vs. Hoskins. Cro. Eliz.* 509, *Spencer vs. Shorey. Do.* 185 *Plain vs. Flor, Do.* 583. *Harrisons case.*) But even if an old case could be found bearing an analogy to this, where the action had been supported, it could not prevail, since the rules of law upon this subject have been so much better defined by a long series of modern adjudications. In the case of *Roberts & Camden*, 9th *East.* 93, which has been relied on, the words charge the plaintiff expressly of being under a prosecution for perjury. The case of *Rece & Mitchell*, 2 *Dallas* 58, was a motion in arrest of judgment, and the declaration lays the oath to have been taken in a case before the said justice depending. No case has been adduced where charging a person with swearing falsely has been held actionable, unless it appeared by the colloquium or by the words themselves, that they had re-

ference to an oath taken in the course of a judicial proceeding.

The motion therefore must be refused.

Justices *Johnson*, *Huger*, *Gantt*, *Richardson* and *Colcock*, concurred.

Thompson, for the motion.

Noble & Wardlaw, contra.

J. J. GRACY & Co. vs. FRED. COATES.

Judgment by default may be taken against a garnishee in attachment, as in other cases.

But the garnishee is not liable for the costs recovered against the absent debtor, except where it appears that he has funds in his hands sufficient for that purpose. In those cases they are given by the act, and in no other.

Tried before Mr. Justice *Johnson*, Newberry, Fall Term, 1822.

THE plaintiff in this case had obtained a domestic attachment against the goods and effects of the defendant, and had summoned *James Bruton*, as a garnishee, to declare how much he was indebted to the absconding debtor; he neglected to appear or to make any return to the summons, and a judgment by default was ordered to be entered up against him for the amount of the plaintiffs debt. Execution thereupon was issued against him for the debt and costs, and also for the costs of the suit against the absent debtor. The money was paid into the hands of the sheriff, and at the same time, notice was given to him not to pay it over to the plaintiff, as he would be called upon to refund the money, on the ground of the illegality of the proceedings.

A motion was at this time made to set aside the judg-

ment and execution, on the ground that a garnishee does not subject himself to a judgment by default of appearance, but that he should be compelled to appear, and declare what he has in his hands belonging to the absent debtor, or how much he is indebted to him, and if that motion should not succeed, that the execution should be set aside, so far as related to the costs of the attachment, and that the sheriff might be ordered to refund the money.

These motions being refused in the court below, a motion was now made to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court:

With regard to the question, whether a judgment can be entered up against a garnishee for default of appearance, it would be sufficient to say that such has been the practice ever since the passing of the act authorizing domestic attachments, and if an uniform practice of nearly forty years does not settle the law, we can never know what the law is. And although it does not seem to comport with the letter of the act, great inconvenience would result from a contrary construction. No judgment could even ever be obtained against a garnishee, after an attachment had been served upon him, if he could elude the further process of the court. I think therefore that we ought not to disturb a practice which has prevailed so long, and from which no inconvenience has hitherto been felt.

In the case of *Faber vs. Bower*, (2 Bay, 124,) the court has decided this question, and supported this method of proceeding on a domestic attachment. It is true that case arose under the act of 1788, and the court seem to admit that the act of 1785, would require a different construction, but that distinction has never been observed, and I can see no foundation for it, and no good reason can be given why different modes of proceeding should prevail in different parts of the state.

I think however that the garnishee is not liable for the costs recovered against the absent debtor, except when it

appears that he has funds in his hands sufficient for that purpose.

In those cases they are given by the act, and in no other.

The motion is therefore refused, except so far as relates to costs.

Justices *Huger, Johnson, Gantt* and *Colcock*, concurred

Oneal & Johnson, for the motion.

Caldwell, contra.

WILLIAM CARUTH vs. ARVA ALLEN.

The plea of *liberum tenementum*, admits the possession in the plaintiff, and the trespass charged in the plaintiff's pleading; and where the plea was not supported, and notwithstanding the jury gave a verdict for the defendant, the court granted a new trial.

TRESPASS, *quare clausum fregit*.—Tried at Abbeville, Fall Term, 1822, before Mr. Justice *Nott*.

This was an action of trespass, *quare clausum fregit*.

The defendant pleaded *liberum tenementum*.

But in tracing up his chain of title, it appeared to have occurred since the bringing of the action, and subsequent to the trespass which he was attempting to justify.

On the part of the plaintiff, there was no evidence of a trespass, except what was admitted by the defendant's plea.

The presiding judge told the jury that the defendant's plea admitted the possession of the plaintiff, and a trespass by himself, and that having failed to support that plea, the plaintiff was entitled to recover—but as he had proved no actual damage, and it was very obvious that he had neither title nor possession, he was only entitled to nominal damages.

The jury found a verdict for the defendant.

This was a motion for a new trial, on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the court :

This court is satisfied with the directions given to the jury by the presiding judge in the court below. In the case of *Singleton & Millet*, (1 *Nott & McCord*, 355,) the court, speaking of the plea of *liberum tenementum*, says, "the plea admits the possession and the trespass charged in the plaintiff's pleadings." If therefore the plea admits the possession and the trespass, the plaintiff was entitled to a verdict—he ought not indeed to have recovered any thing more than nominal damages, perhaps not enough to have carried the costs ; and that perhaps in any other form of action, would have been a good cause for not granting a new trial ; but the verdict in this case establishes the right of the land in the defendant, when in fact he failed to support his plea.

The motion therefore must be granted.

Justices *Gantt*, *Richardson* and *Colcock*, concurred.

Noble & Wardlaw, for the motion.

Livingston, contra.

ELIZABETH VAUGHAN vs. JOHN RHODES.

Trespass *vi et armis*, is a proper remedy by a parent for the taking away his child.

The presumption should be always in favor of the legitimacy of a child, and he should not be bastardized by mere rumor.

THIS was an action of trespass, *vi et armis*, brought by the plaintiff against the defendant for taking away her daughter, a girl about twelve or thirteen years old, by which she lost her services, &c. It appeared, in evidence, that the plaintiff was a woman of ill fame and had gone off and been absent from the state about a year ; this daugh-

ter was left in the family of the son of a man with whom the mother cohabited and with whom she had gone away. The defendant wanting a nurse for his children, and hearing of the situation of this little girl, applied to her for that purpose. She very readily consented and went and staid in his family until her mother returned. Several of the witnesses said that they understood that she was an illegitimate child, though they did not know the fact, because they were not acquainted with her mother. In early life, a witness said that he had heard that she was married to *Vaughan*, whose name she had taken and which name she had given to her daughter, but he never knew *Vaughan*; neither did he know this woman at that time. There was a great deal of other evidence given which it is unnecessary to report, as the court considered it of such a nature as to be exclusively proper for the consideration of the jury, and furnishing no ground on which the verdict could be set aside.

The jury found a verdict for the plaintiff, and a motion was now made for a new trial on the following grounds:

1st. Because the plaintiff ought to have brought an action on the case and not trespass *vi et armis*.

2nd. Because, being an illegitimate child, the mother could not maintain an action for the loss of her services.

Mr. Justice *Nott* delivered the opinion of the court:

Although it is the misfortune of the subject of this action to have a very unnatural parent; one who appears to have very little regard to her education or morals, yet if she is entitled to an action at all, the form must be the same as in other cases of a similar nature. Judge *Reive*, in his Treatise on Domestic Relations, asks the question, "can a father have an action of trespass *vi et armis*, for taking away his child?" In England, he says, it has long been settled that he may have an action of trespass *vi et armis*, for taking away the heir; but that he has not found any case of an action for taking away by force a younger child. Yet he says, upon the principles of the

common law, it is clear that in these states, an action will lie for taking away any child, for that all are heirs. But that he sees no reason why, in England, the father may not maintain his action against the person who takes away any child; for that he is bound to perform certain duties towards his children which he cannot perform if they be taken from him; and to enable him to perform these duties he is entitled to the custody of his children, and if this right should be violated by force, he has no hesitation in saying he can maintain this action: And I recollect an early decision of this court where it was held that a parent had such an interest in the support, education and general welfare of his child, that he could maintain an action in this form against any person who should deprive him of it. Indeed, it appears to be the most appropriate action. It is an immediate injury to the parent. The child is not able to consent, and the law therefore implies force as the taking is unlawful.

The second ground would probably have availed the defendant, if the fact on which he relies had been established. But none of the witnesses had known this woman for many years. They know nothing of the illegitimacy of her child, except from neighborhood report. And it was also reported that she had been married. On conflicting evidence of that sort, I think it was the most charitable, as well as most consistent with the principles of law, to presume in favor of legitimacy. A person ought not to be bastardized by mere rumour which may be unsupported by any foundation. I think the verdict of the jury on this point was consistent with the law and the evidence, and ought to be conclusive of the fact.

The motion therefore is refused.

Justices *Johnson, Huger, Gantt, Richardson* and *Colcock*, concurred.

Herndon, for the motion.

Thompson, contra.

NETTLES vs. HARRISON.

Where a witness, not to criminate himself, is excused from answering a question or from being examined generally, his declarations as to the same facts, affecting the character of a third person, can not be given in evidence :

1st. Because such partial and *ex parte* evidence should not be allowed to the injury of any character ; and

2ndly. Because a witness can not be cross examined to any fact, which if admitted would be collateral and wholly irrelevant to the matter in issue, for the purpose of contradicting and discrediting him, by other evidence, in case he should deny the fact.

The defendant said of the plaintiff, that he kept a whore house. Verdict \$5000. New trial granted ; as the words were uttered but once ; and induced by the plaintiff's encouraging the defendant's son to visit his house, having daughters none of the best characters, with whom his son had been too intimate.

Tried at Winnsborough, Fall Term, 1822, before Mr.
Justice Colcock.

THIS was an action of slander alleging that the defendant had accused the plaintiff with keeping a whore house. The testimony was very voluminous, but as the court supported the verdict on all the grounds taken in the brief, except two, it is only necessary to report so much of the evidence as relates to those two. The defendant attempted to justify the speaking of the words by proving the truth of them, or at least to mitigate the damages, by shewing that he had good cause to suspect that they were true. With that view, he called his own son, by whom the plaintiff's step daughter, (who lived in the house with him,) had had an illegitimate child, to prove his connexion with her. After having proved the fact, he was asked if he had not promised her marriage : He objected to answering that question, because, as there was an action depending against him for a breach of promise, it might require him to give evidence against himself. The objection was sustained. He was then asked if he had never said that he had made such promise. He said he never had. A

Witness was then called, who proved that he had heard him make such a declaration. Several witnesses were called, who proved that the plaintiff's wife was not considered a virtuous woman: That her oldest daughter had had an illegitimate child, and that the character of the youngest daughter had not been unsuspected before the speaking of these words. It also appeared that the defendant's son, (*Kirkland Harrison*,) visited this family, and was very attentive to this youngest daughter, by whom he afterwards had a child. The defendant was apprehensive that he was disposed to marry her, and was much opposed to the connection, and had desired the plaintiff not to let him frequent his house. The plaintiff however still permitted him to continue his visits, and expressed a wish that he should marry her. The plaintiff and the defendant happening to meet where there was a considerable collection of people, the defendant got in a passion, and charged the plaintiff with having stolen his son from him, and added further, that he kept a whore house.

The jury found a verdict for \$5,000. A motion was now made for a new trial, on a variety of grounds. But the opinion of the court was confined to the two following:

1st. Because the presiding judge permitted the declaration of *Kirkland Harrison*, that he had promised to marry the defendant's step-daughter, to be given in evidence by way of aggravating the damages.

2d. Because the damages are excessive.

Mr. Justice *Nott* delivered the opinion of the court:

The rule of law, that hearsay shall not be received as evidence, is so well established, that it would be an imputation on any one, pretending to be conversant with law, to say that he did not know it. But if authority is wanting for so plain a proposition, it may be found in *Phillips On Evidence*, 173, and the authorities there quoted. To this rule, cases of pedigree, prescription and custom are exceptions. But it is not pretended that this case comes within those exceptions. It is however contended, that

as the witness himself could not be examined as to the point in question, his declarations might be given in evidence. But it certainly does not follow, that merely because a person cannot be sworn, his declarations can be given in evidence. A person who is interested or infamous cannot be sworn as a witness, neither can his declarations be admitted. It would be extraordinary if a person's declarations, not upon oath, should be evidence, whose oath would not be received. The first question which arises on this part of the case, is, could not the witness be compelled to answer the question? Secondly, if he could not, might his declaration be received? To determine the first question, we must look to the object of the defendant in calling the witness. He had charged the plaintiff with keeping a whore-house, and if he could prove that all the women about the house were of that description, he would either establish the charge, or it would go in mitigation of damages. He had given evidence of the suspicious character of the wife. He had proved that one of her daughters had had an illegitimate child, and that this girl's character had not escaped censure. This witness was called to establish the fact upon her. And to repel the charge of her general bad character, he was asked on his cross examination, if he had not been the cause of her seduction, by a promise of marriage. The pretence for not answering the question was, that if he answered in the affirmative, it might be given in evidence against him in an action for a breach of promise of marriage then depending against him. I will here put out of view the great contested question, whether a witness can be compelled to answer a question which may subject him to a civil action. I think I may venture to affirm, without any fear of contradiction, that he could not have been compelled to answer the questions which were put to him on his direct examination. He could not be required to publish his own disgrace, by swearing to a criminal connection with this young woman; and if he had refused to have been sworn, I presume his declarations to that effect

could not have been given in evidence on the part of the defendant, and yet, in that case, he would have had the same claim upon him that the plaintiff has now. Neither in that case will it be pretended, I presume, that the plaintiff could have had the benefit of the testimony which he now claims; but if the witness chose to volunteer his services to fix a disgrace upon her, he ought to have been compelled to disclose all the circumstances connected with it, which went in any manner to remove the reproach. Suppose a person should be indicted for murder, and a witness should be called who could not give a correct account of the transaction without implicating himself? If he should make such an objection to his examination, the objection would be sustained. (*The State vs. Edwards, 2 Nott & McCord, 13.*) But if he should prove the defendant's confession of his guilt, or facts which went to establish it, he would be required to tell all the circumstances which would go to exculpate him, even though they might implicate himself. He would not be permitted to give a partial statement of the circumstances—he must tell the whole or none, and such, I think, should have been the course in this case.

But suppose the witness could not have been required to answer the question, does it follow that his declarations are evidence? What are the reasons why hearsay is not received as evidence? Why first, because the person is not upon oath. Secondly, because the party against whom it is to operate has no opportunity to cross-examine. In the case of the *State vs. Edwards*, who was indicted for fighting a duel, the witnesses declined answering the questions put to them, because their answers would subject them to a prosecution; but I presume their previous declarations could not have been substituted for the reasons already given, and the rules of evidence are the same in civil as in criminal cases. The rule of law that when the best evidence cannot be had, the next best may be received; must not be carried too far. Secondary evidence may be received, but not that which is incompetent.—

Thus for instance, if an original deed is lost, a copy may be given in evidence. If a copy cannot be had, extracts from it may be received, and if extracts cannot be obtained, you may give parol evidence of its contents; but that is as far as the rule can be extended. Hearsay, or the declarations of a person of its contents cannot be admitted; and if a person cannot establish his case by competent testimony, he must fail. The declarations of a deceased person, even in extremis, (except in particular cases) are not evidence, (*Caison vs. Austin*, 7 *Johnson Rep.* 95. *Gamors vs. Barnard*, 1 *Anstruther*, 299.) The circumstance of his not being able to prove it any other way will not authorize the introduction of incompetent testimony. It is however contended, in argument, that his declarations might be given in evidence, in order to show that he had contradicted himself, and thereby discredit him; but that would only be permitting one error for the purpose of supporting another. To permit an immaterial question to be asked, in order to draw from a witness an answer for the purpose of calling a witness to contradict it, is as much a violation of the rules of law as the admission of hearsay evidence itself. I am aware that there have been conflicting opinions on this subject, but I suppose we may still indulge the hope, that the law, like other sciences, is still advancing towards perfection, and this point seems now to be pretty well settled by modern adjudications.— In *Phillips On Evidence*, 210, it is laid down, “that a witness cannot be cross-examined to any fact, which, if admitted, would be collateral and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence in case he should deny the fact, and in that manner to discredit his testimony. In the case of *Spenceley vs. De Willott*, (7 *East*, 108,) Lord *Ellenborough* said he had ruled the point again and again until he was tired of hearing it agitated, and he wished it might be carried up, that it might be fully put to rest. It was carried up, and the court were all decidedly of opinion that it was not competent for counsel, on cross-examination, to question

a witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he should answer in the negative, by calling another witness to disprove what he said. The same point was ruled in the case of *Harris vs. Tippit*, (2 *Campbell*, 637.) If he had said upon his oath that he had never made any such promise, I admit he might have been asked if he had never said so, and upon his denying it, a witness might have been called to show that he had contradicted himself; because then the question would have been relevant to the issue; but whether he had said no or not, was irrelevant, because it was not evidence.

But suppose these authorities are not to be recognized as law, still I contend the testimony was inadmissible. Admit that a witness may be asked an immaterial question, merely with a view to call another to contradict and discredit him; yet the question must be such as not to affect the rights, interests or characters of others. Suppose the question had been put to the witness, whether he had not said he had had a criminal connexion with one of the most respectable women in the district, and he had answered in the negative, would the court have suffered a witness to be called to prove that he had said so? Would it be permitted that the character of a respectable woman should be slandered and traduced for the purpose of shewing that a witness had sworn falsely. And is it not equally objectionable that the declaration of a witness, which is not, of itself, competent testimony, but which may nevertheless have an important influence on the case in litigation, should be received? It is said, we do not know that it had any influence on the jury. I can only say, it was introduced avowedly for that purpose; it was used in the argument for that purpose: And for that purpose, it was submitted to the jury under the whole weight and influence of the court, and whenever improper evidence has been permitted to go to the jury, it furnishes good ground for a new trial, unless we can see that it could not have had any influence on the minds of the jury.

In every point of view, therefore, in which I have been able to consider the question, I think the declarations of this witness ought not to have been admitted ; it went in my mind, to violate one of the safest and best rules of evidence, and therefore furnishes a good ground for a new trial.

The next question relates to the amount of damages. The reluctance which this court has always expressed to interfere with the verdicts of juries would have induced me to pause a long time before I should have consented to grant a new trial on this ground alone. I am glad, therefore, that another has presented itself which enables me to do justice to my own feelings in granting a new trial, where I think the damages quite unauthorized by the circumstances of the case. Without resting my opinion singly on that ground, it appeared, in evidence, that the defendant's son was visiting the plaintiff's house, and was very attentive to his step daughter. It also further appeared that the plaintiff permitted his visits against the consent of the defendant. That the plaintiff had expressed a wish that she should marry him, but that the defendant was opposed to the connection. There was also the testimony of several witnesses, that this young woman's mother was of a suspicious character in regard to her virtue ; that her elder sister had had an illegitimate child, and that her own character had not entirely escaped censure. Under those circumstances, the defendant had on one occasion, and one only, when under a strong excitement, smarting under the anguish of a fathers feelings for a son, who he thought was travelling the road to ruin, and under the encouragement of the plaintiff himself, said to him he had stolen his son from him, and that he kept a whore house. This statement of facts is controverted, because it is contended that the defendant's witnesses were not entitled to credit ; but I do not know why they were not. Their characters were not impeached. There was at least evidence enough to induce the defendant to wish his son to discontinue his visits. It is also said that the

young woman, to whom the defendant's son was paying attention, was of good character until it was destroyed by his seductive promises. But that was one of the consequences which perhaps the defendant anticipated, and for the fear of which, he wished his son to discontinue his visits. The character of the mother was suspected. One daughter had already fallen, and the virtue of the other, as he rightly suspected, was not composed of the most impregnable materials; for she afterwards became the victim of the same vice. If his son went there with honorable views, it was to form a connection which he disapproved. If he was actuated by improper motives, it was calculated to lead to disgrace and trouble which he wished him to avoid. Much has been said in the course of this argument, of this young man's character; but I do not think it at all material to the issue in this case. If he had a good character, his father wished to preserve it; if not, he was equally the object of parental care and solicitude, and he wished to reclaim him. I do not mean to say that the defendant is to be justified. Of that, the jury were the proper judges; but surely some allowance is to be made for the feelings of a parent. If there is any case in which we ought to look with indulgence on the weakness of human nature, it is in the partiality of a parent for a child, and on no occasion could we expect it to manifest itself more strongly, than when he was about to enter into an engagement which would fix his destiny for life. I think, if under such circumstances, he has in a transport of passion been betrayed into a hasty expression, it is not such a crime but it might be atoned for by a sum much less than five thousand dollars. If he had gone about coolly and deliberately, day after day, and week after week, circulating such a report through the country, his case would have been of a different complexion, but he has spoken the words but once, and then he addressed himself to the plaintiff. I think there is reason to believe that the conduct of the son has been identified with that of the father, and that by confounding two cases, distinct in their pa-

ture, the jury have been induced to give a verdict, which, perhaps their more deliberate judgment would not approve. It appears to me, therefore, a very proper case to go back to another jury.

The motion is granted.

Justice *Johnson*, concurred.

Huger, Justice :

I concur on the ground of excessive damages, they appear to be enormous.

Clarke, for the motion.

Pearson, contra.

JAMES ENGLISH vs. JOSHUA ENGLISH.

No witness residing in the state can be examined *de bene esse*, by the common law, and we have no statute authorizing such an examination of a witness residing within forty miles, merely because he is a President of a Bank.

Tried in Kershaw district, November Term, 1822.

AT the last sitting of the court, holden for the district of Kershaw, Mr. Justice *Gantt*, upon a motion to take the examination of *William E. Hayne*, by commission *de bene esse* on the part of the plaintiff, granted an order to that effect ; Mr. *Hayne* being President of the Branch of the Bank of the State of South Carolina, at Columbia.

The defendant appealed on the ground that there was no law to warrant such an order.

Mr. Justice *Richardson* delivered the opinion of the court :

No witness residing in the state could be examined *de bene esse* by the common law, and we have no statute au-

thorizing such an examination of a witness residing within forty miles, merely because he is President of a Branch Bank.

The motion is therefore granted.

Justices *Huger*, *Nott*, *Colcock* and *Johnson*, concurred.

———, for the motion.

———, contra.

BENJAMIN COHEN vs. RICHARD SADDLER.

Damages arising *ex contractu*, as for a breach of warranty, may be recovered before a magistrate, if the amount be within his jurisdiction. If a defendant before a magistrate will not offer to deny the debt on oath, the oath of the plaintiff is sufficient to prove the demand.

TRIED before Mr. Justice *Johnson*, Fall Term, 1822.

Richard Saddler had summoned *Benjamin Cohen* to appear before a magistrate to answer for a breach of contract. He charged that *Cohen* had warranted his watch to run for one year, after his doing some repairs to her.— That the watch, before the expiration of a year stopt : that he called on *Cohen* to repair, who refused to do so : that he employed another watch-maker, who repaired the watch, and charged him five dollars, to recover which, the above summons issued. The above facts the magistrate allowed *Saddler* to swear to, who was the only witness, and he gave judgment for *Saddler* to the amount of five dollars.

The defendant moved before Mr. Justice *Johnson* for a prohibition, which was refused. He now moved to reverse that decision, and that a prohibition might issue on the following grounds :

1st. Because the magistrate had no jurisdiction.

2d. Because the court refused the motion, when the sum for which the judgment was given was under six dollars, and which sounding in damages, was proved before the magistrate on the oath of the party.

3d. Because the court refused the motion, although the magistrate gave judgment without legal proof.

Mr. Justice *Richardson* delivered the opinion of the court:

The first question is, was this a case of *contract*, so as to be embraced within the jurisdiction of a justice of the peace, or was it one as is expressed in the act of 1791,—(2 *Faust*, 53,) “sounding in damages?” It is plain that the claim arose from the breach of an express warranty,—*that the watch would run for one year*. It was then in the nature of a debt, because it arose *ex contractu*, and was therefore plainly within the jurisdiction of a magistrate. (1 *Faust*, 53.)

The second question is, was the case legally submitted? The objection is, that the Justice suffered the plaintiff to prove his own claim.

But the act of 1747, (*P. L.* 214, 1 *Brevard*, 466,) expressly authorizes the Justice to swear the parties litigant, and if the defendant will not offer to deny the debt on oath, the oath of the plaintiff shall be sufficient to prove it. The testimony of the plaintiff then was legal, as well as the case within the jurisdiction of the Justice. To prohibit his proceeding, would be to oust the Justice in a case which is plainly within his cognizance. (See *McDonald & Bomer vs. Elfe*, 1 *Nott & McCord*, 501, and *State vs. Wakely*, 2 *Nott & McCord*, 410.)

The motion is therefore dismissed.

Justices *Huger*, *Nott*, *Colcock*, *Gantt* and *Johnson*, concurred.

Williams, for the motion.

Mills, contra.

THE STATE vs. DAVID YOUNGBLOOD.

The statute of limitations bars an indictment for hog stealing, if not commenced within six months after the offence.

THIS was an indictment for hog stealing, to which the statute of limitations was pleaded in bar. The presiding judge did not think that the statute operated as a bar to the prosecution, and the defendant was convicted. This was therefore an application for a new trial, on the ground that the statute operated as a bar in this case, six months having elapsed before any prosecution was commenced.

Mr. Justice *Gantt* delivered the opinion of the court:

By the act of 1812, all penalties and forfeitures are to be prosecuted for within six months, and not after.

I am therefore of opinion that the statute should have shielded the defendant from a prosecution after that period had elapsed. A new trial is therefore granted.

Justices *Colcock* and *Nott*, concurred.

Richardson, Justice :

I concur in this opinion upon the grounds only, of the long practice, and because I am satisfied that the same decision was formerly made.

Jeter, solicitor, for the motion.

Glascock, contra.

WILLIAM SNELGROVE vs. MICAHAH MARTIN and A. H. PATRICK.

The declarations of the payee, indorsing a note, made after the note was drawn, but prior to his indorsement, that the note had been given for an illegal consideration (gaming) are competent testimony to invalidate the note in the hands of an indorsee. (a.)

THIS was an action on two notes drawn by the defendants, payable to *G. D. Lester*, and indorsed to the plaintiff for a valuable consideration.

The defence was that the notes were given for a gaming consideration. To support this defence, evidence of the subsequent declarations of *Lester* was offered by the defendants, and objected to by the plaintiff; but the presiding judge overruled the objection, and the evidence went to the jury.

The defendants also gave in evidence some loose declarations of the plaintiff in support of the same defence.

The jury found a verdict for the defendants.

The plaintiff moved the Constitutional Court for a new trial, upon the following grounds, to-wit :

1st. Because evidence of the declaration of *Lester* should not have been received.

2d. Because the finding of the jury that these notes were given for a gaming consideration, was not warranted by the evidence.

Mr. Justice *Richardson* delivered the opinion of the court :

The question submitted is, whether the declarations of the payee indorsing a note, made after the note had been drawn, but prior to his indorsement, *that the note had been given for an illegal consideration*, is competent testimony to invalidate the note in the hands of an indorsee ?

It must be borne in mind, that by an Act of the Legislature, a note given for a gaming consideration is void in the hands of an indorsee, so that the question before us is governed by the general rules of evidence, and not by any peculiar doctrine of the mercantile law, or of bills, notes, &c. By the act, gaming takes a note out of the usual doctrine, and places the indorsee *quoad hoc, in the situation of an assignee of an unnegotiable debt*.

Now at common law, the acts, declarations and confessions of a party to a suit have been always received as the

highest evidence against such party, and in like manner the declarations, acts, &c. relating to the matter in dispute, made by a person while he was interested, is good evidence against a party claiming subsequently under such person. Were this not the rule, a debtor could not be safe in taking the receipt of his creditor. For instance, the obligee of a bond might give loose receipts, or acknowledge the bond paid in full ; but if he afterwards assigned the bond, the assignee would hold the bond independent of such acknowledgment of receipts. In a word, there could be no reliance placed in a settlement with a debtor or arrangement with the owner of an estate, as he would have merely to assign the one or convey the other, in order to get rid of his own acts.

I take the general rule of the common law to be, that wherever the act or declaration of a party then interested, would be evidence against himself, such will be evidence against his subsequent assignee, or party claiming under him.

In the case before us, the payee and owner declared the note to have been given for a consideration, which, if the true consideration, destroyed it, not only in his own hands but in the hands of an indorsee.

As then the indorsee claimed under the payee, such declaration is necessarily evidence against such indorsee, whose title and claim depend upon the former.

The motion is therefore refused.

Justices *Gantt* and *Johnson*, concurred.

Colcock, Justice : I dissent from this opinion :

1st. Because the payee was a good witness for the defendant, and ought to have been sworn, and if sworn, his testimony on oath would have been better evidence than his declarations, when not on oath.

2d. Because the declaration of the payee having been made subsequent to the execution of the note, they are not a part of the *res gesta*.

3d. Because the declarations of a person, not a party to

the suit, as to the fact at issue, ought not to have been received.

Levy & McWillie, for the motion.

J. C. Carter, contra.

(a,) *Vide, Ante 214, Martin vs. Lightner.*

RIGHTMAN BAGLEY *ads.* STEPHEN CLEMENT.

Where a witness had been subpoenaed by the *defendant*, and the case was decided in his favor, and execution issued out and satisfied, the witness having neglected to have his attendance taxed, sued the *plaintiff* before a justice of the peace, *Held* that the witness could not recover, there being no privity of contract.

Tried before Judge *Colcock*, Fairfield, November Term, 1822.

SUIT was brought before a justice by *S. Clement*, against *R. Bagley*, on two subpoena tickets, served upon *S. Clement* by *Robert Knox*, in the case of said *R. Bagley vs. R. Knox*, and on which *S. Clement* proved twelve days attendance. The justice gave a decree for *S. Clement*, and *R. Bagley* appealed to the Court of Common Pleas.

The suit between *R. Bagley & R. Knox*, in which *S. Clement* attended as a witness, had been decided against *Bagley*, execution issued and returned satisfied.

The presiding Judge affirmed the decree of the justice.

The defendant moved the Constitutional Court for a new trial, on the following grounds :

1st. Because *Clement* had lost his right of recovering his demand against *Bagley*, by neglecting to have his subpoenas taxed, and inserted by the clerk in the execution.

2nd. Because there was no privity of contract between *Clement* and *Bagley*.

Mr. Justice *Richardson* delivered the opinion of the court :

Where a party to a suit at law has subpoenaed a witness, which witness, in pursuance of the subpoena, attends the trial, there is no doubt that the witness has a right of action against such party for his legal costs. This right arises from an implied contract, to pay for the time lost by the witness, while in the service of the party subpoenaing him ; but there can be no such contract implied between such witness and any other party to the same suit at law. It is true that when either party obtains a verdict, a decree at law, &c. he may have the legal costs paid or to be paid his own witnesses, taxed, and may recover such costs from the party against whom the verdict or decree has been obtained, by virtue of an act of the legislature. But this can be done in the court only where the decree or verdict has been obtained. It is allowed to the successful party, under the supposition that he has been put to the same expense by reason of the suit. In a word, the party subpoenaing is liable to his own witness, and in case of success may recover against the opposite party ; but it does not follow that the witness can do the same. It would, too, be altogether needless, if not very dangerous, to suffer a magistrate to tax the costs arising out of a suit, not carried on before himself. Such costs are always taxed by the proper officer of the court, and mistakes would arise, if any other tribunal should intermeddle. In cases like the one before us, it would be suffering the magistrate in effect, to review the taxation of costs, and to increase or diminish those allowed by the Circuit Court. The attorney, clerk, sheriff, or witness having costs disallowed by the highest court, might appeal to the equity and justice of the court for the trial of small and mean cases.

The motion is therefore granted.

Justices *Nott*, *Colcock*, *Gantt* and *Johnson*, concurred.

Peareson, for the motion.

———, contra.

JAMES CAMMER *ads.* B. & D. HARRISON.

A note payable on demand, is not entitled to days of grace ; but an action may be immediately brought without any other demand being made.

Tried before Mr. Justice *Johnson*, Richland district.

THIS was an action of assumpsit on note, in the following words : “ On demand, I promise to pay *B. & D. Harrison* the sum of eighty five dollars, 50-100 cts. for value received, this 9th March, 1822.

JAMES CAMMER.”

The writ was issued on the same day the note was given.

No demand was made before the action was brought.

The defendant moved for a non-suit, upon the following grounds :

1st. Because no demand was made before the action was brought.

2nd. Because the action was brought before the expiration of the days of grace.

3rd. Because the action was brought on the same day the note was given.

The motion for a non-suit was refused by the presiding Judge, and the jury found a verdict for the plaintiffs.

The defendant now renewed the motion for a non-suit, upon the above grounds.

Mr. Justice *Richardson* delivered the opinion of the court :

The cause of this appeal was probably the misapprehension that a note, though payable on demand, was still entitled to the three days of grace ; but *Chitty*, 279, says, “ when a check or bill, &c. is expressed to be payable on demand, or when no time of payment is expressed, it is payable instantly on presentment without any allowance of days of grace.”

And the same exception to the general rule, which al-

lows to notes three days of grace, has been recognized in the cases of *Herrick vs. Bennett*, and *Thompson v. Kitchen*, (8 *Johnson's Rep.* 189.) A note, then, which expresses no time of payment, is payable instantly ; so much so, that this court, in the case of *Woodward vs. Dunfer*, decided that the statute of limitations began to run from the date of such a note. The debt was therefore due, and the plaintiff could, of course, commence his action immediately.

It is further contended that the plaintiff was bound to make a demand before commencing suit ; but no demand is requisite to charge a debtor, though it may be necessary, in order to render collateral securities liable, as indorsers, &c. and if it were requisite to make a demand before suit brought, the debtor might put himself out of the way and unjustly postpone the claim of his creditor, if not finally bar the recovery by lapse of time. The contract on the part of the debtor is simply the acknowledgment of a debt due, with a promise to pay it when required, and the requisition to pay may be made as well by writ as any other way. It is precisely like the case of a man having a deposit of money for another, the depositor may demand it, or sue at law at any time ; and on the other hand, the depositee may pay it at any time. The requisition to pay, and the failure to comply, affects in no way the contract, except that the debtor being no longer a depositee by the consent of the depositor, shews, by his neglect to pay, a wilful detension of the money of his creditor, which cannot add to the validity of the debt, nor give a remedy for the recovery, though it may superadd a fair claim to interest from the time of the detention.

The motion is therefore refused.

Justices *Nott*, *Colcock* and *Johnson*, concurred.

Gregg, for the motion.

Goodwyn and *Holmes*, contra.

MICHAEL P. WALSH *ads.* THE STATE.

If it be not necessary to set out the words in a libel *literatim*, yet at least it must be set out in intelligible language, shewing the sense and meaning of the words. And where the words laid were "worse *that* the lowest vagabonds, &c." and the words proved were "worse *than* the lowest vagabonds," the court granted a new trial.

IN this case the indictment imported to set forth the words, according to the substance, and not according to the tenor of the libel. The words set forth were as follows, "you are, without exception, the meanest man and the greatest rascal I ever came across or heard of; you are worse *that* the lowest vagabonds, &c."

But the libel offered in evidence contained the words as follows: "You are, without exception, the meanest man and the greatest rascal *that* I ever came across, or heard of; you are worse *than* the lowest vagabonds, &c."

The court charged the jury that the same strictness of proof was not required, nor the same variance fatal, where the indictment set forth the libel according to the substance that is required, or would be fatal, where the libel is set forth according to the tenor.

The jury found the defendant guilty.

The defendant moved the Constitutional Court for a new trial, upon the ground of misdirection of the court, and in arrest of judgment, upon the ground that the indictment should set forth the libel according to the tenor, and not according to the substance.

Mr. Justice *Richardson* delivered the opinion of the court.

The question made in this case is when a count sets forth a libel, not by the *tenor*, which word presupposes a correct copy of the libel, but merely by the substance, whether such substance, i. e. the sense and meaning of the libel, must not be still set forth and exhibited in the very

Words, i. e. in correct verbal extracts taken from the body of the libel itself, or may it be done in any other synonymous language, which, although differing in words, yet preserves the sense and meaning of the libel.

I am much inclined to the opinion that whether the libel be set forth according to the tenor or the substance, still the libellous matter must be made to appear from the very words of the libel ; for if these do not appear, how could the defendant take the judgment of the court, whether the words he had written or published constituted a libel or not ; and how could he plead a former acquittal in law, of a second prosecution ? (See 3 Barn. &c. *Auld. Wrights vs. Clement*, 503. *Starkie* 304, 234. 319. 1 *Chitty, Crim. Law*, 234, 169, 173. 1 *Doug.* 193.)

But as it is unnecessary, no final opinion is given upon that question.

The libel must be set forth, if not literally, at least by intelligible language, shewing the sense and meaning of the libellous matter. But what sense similar to that expressed in the plain libel, “worse *than* the lowest vagabonds, &c.” can be found in the words, “worse *that* the lowest vagabonds?” In the latter sentence, we have merely an unmeaning collocation of words in the place of a very intelligible and libellous charge.

The libel therefore being set forth neither literally in its own words, nor substantially by its sense, a new trial is granted.

Justices *Colcock* and *Nott*, concurred.

Gregg, for the motion.

Jeter, Sol. contra.

WILLIAMSON vs. CUMMINGS.

WHERE a defendant states by affidavit that he has a substantial defence, and plainly shows that there had been a mistake between himself and his attorney, the court will suffer such defendant to enter pleas and make his defence, notwithstanding no appearance had been entered the first term, after the service of the writ. Such indulgence will be allowed whenever by misfortune or mistake his appearance has not been entered at the usual time. (*See Parr vs. Evans, 1 McCord, 283.*)

JOSEPH MICKLE vs. ALLEN BAKER.

No special order for bail need be endorsed upon a writ, where the plaintiff swears to a particular sum due upon the rescission of a contract.

Tried before Mr. Justice *Gantt*, at Kershaw, November Term, 1822.

A SUMMONS was issued by the plaintiff against the defendant, charging that the defendant was indebted to the plaintiff \$ 57, and interest, *for money had and received.*

To this process was attached, an affidavit, signed and sworn to according to law, in the following words:—
“ Personally appeared before me *Joseph Mickle*, who, on oath, saith he drew an order on Capt. *D. Grafton*, in favor of *Allen Baker*, for fifty-seven dollars, which order has been accepted and paid, as *Baker* says, by said *Grafton*, and that the consideration for which the order was drawn, was a horse, valued at fifty-seven dollars, which proving to be unsound, was returned to the seller *Baker*, and again received by him ; and that the said *Baker* is justly indebted to said *Joseph* for money had and received, fifty-seven dollars, and that he is a transient person.”

No order for bail was endorsed on the process, but the sheriff arrested the defendant, and took bail.

On motion, the presiding judge ordered the bail to be discharged, on the ground that there was not an order for bail by a Judge or Justice of Quorum, endorsed on the process.

The plaintiff moved to rescind the said order to discharge the bail, on the ground that no special order for bail was necessary to authorize the sheriff to arrest, and that the arrest was legal, and the bail bound, and therefore the bail was improperly discharged.

Mr. Justice *Richardson* delivered the opinion of the court :

In order to hold a defendant to bail, without a special order, under the act of 1769, (P. L. 273,) it is requisite that the affidavit should state a specific sum due, for or upon what due, and that it had arisen from a contract express or implied, as the claim must be in the nature of a debt.

The affidavit in question states \$57 due, being the price of the horse, returned and accepted by the defendant; which acceptance raised an implied contract to return the price.

Supposing then the facts true as sworn to, the former contract for the sale of the horse had been rescinded, and the price remained in the hands of the defendant, as holder of money to the use of the plaintiff. It became a debt. The affidavit was therefore sufficient without a special order, and the motion is therefore granted.

Justices *Huger*, *Nott* and *Johnson*, concurred.

Levy & McWillie, for the motion.

J. C. Carter, contra.

DAVID RAMSAY *and others*, Trustees, &c. *vs.* ROBERT MARSH.

Col. *Laurens*, by his will, devised to Dr. *Ramsay* and wife all his lands at Long Cane, &c.—“To hold the same to them and their heirs, in trust to, and for, the use and behoof of his grand daughter *Frances E. Laurens*, during her life, and in case she should have a child, or children, or grand child, or grand children living at her death, then he devised the same to such child, &c. to their heirs forever;” the court Held that the legal estate vested by the Statute of Uses in the *cestui que use*.

TRESPASS to try title—tried at Abbeville.

This action was brought by the plaintiffs as trustees for *Frances Eleanor Henderson*, (*late Laurens*,) a feme covert and devisee, under the last will and testament of Col. *Henry Laurens*.

Mr. Justice *Gantt* directed a non-suit, on the ground that the legal estate was in the *cestui que use*, and not in the trustees; and that the action ought to have been bro't in the name of the legal owner. The present was therefore a motion to set aside the non-suit, on the ground that the law of the case was mistaken by the presiding judge.

Mr. Justice *Gantt* delivered the opinion of the court:

The clause in the will of *Henry Laurens*, under which the devisee claims, is in the following words:

“I give and devise to my daughter, Mrs. *Ramsay*, and to Dr. *Ramsay*, all my lands at Long Cane, in the district of Ninety-Six, containing in the whole about six thousand acres, together with all my lots in the village of Hamstead, and all my marsh in the front thereof, (which lands I have estimated at one thousand seven hundred and fifty pounds, although in my conscience, I believe them to be worth more than double that sum,) to hold the same to them and their heirs in trust, and to and for the use and behoof of my grand daughter, *Frances Eleanor Laurens*,

during her life, and in case she should leave a child, or children, or grand child, or grand children, living at her death, then I devise the same to such child, or grand child, if only one, in fee simple, but if more than one, then I devise the same to them, share and share alike, (the grand children representing the parent,) and to their heirs forever. But in case she should die without leaving a child, or children, or grand child, then I devise the said lands to my son *Henry* and his heirs for ever.

Another clause in the will of the testator, is in these words :

“ I constitute and appoint Dr. *Ramsay*, and the wife of Dr. *Ramsay*, my dear daughter *Martha Laurens Ramsay*, guardians and trustees of my grand daughter, until she shall be of age to receive her estate.”

The will bears date on the first day of November, 1792, and was proved on the 7th January, 1793.

The question presented for the consideration of the court is, whether *Frances Eleanor Laurens*, the devisee, took the legal estate in the lands devised, or whether the same, by the will vested in the trustees. The solution of this question will depend upon the construction which must be put upon the Statute of Uses, (27 *Henry 8th*, C. 10,) and made of force in this state.

It would be altogether unavailing to enter into a discussion of the origin of uses, the inroad which was made by their introduction into the simplicity of the common law, and the ill effects which were produced by dividing the possessions from the use. The Statute of Henry the 8th, after reciting the various inconveniences occasioned by the introduction of uses, enacts, “ that when any person shall be seized of lands, &c. to the use, confidence, or trust of any other person or body politic, the person, &c. entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall, from thenceforth, stand and be seized or possessed of the land, &c. of and in the like estates as they have in the use, trust, or confidence, and that the estate of the person so seized to uses, shall be deemed to be

in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." This Statute, Judge *Blackstone* says, conveys the possession to the use, and transfers the use into possession; thereby making the *cestui que use complete owner* of the lands and tenements, as well at law as in equity. (2 *Black. Com.* 332.) And Lord *Bacon*, in his reading on this Statute says, that the possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but *an actual estate*. (See *Cro. Eliz.* 46.)

The strict construction which was put upon this statute, occasioned a distinction to be drawn between such uses as were executed by the Statute, and such as were not so executed. Chancery took cognizance of the latter under the name of trusts.

There were three direct modes of creating such a trust as would prevent the use from being executed.

The first was where a use was limited on a use. The common law judges in their construction of the statute held, that the second limitation to use was a nullity, the words of the statute being "where any person is seized of any lands and tenements."

But no such difficulty is presented in the clause of the will under consideration. In it there is no limitation of a use upon a use, but such an estate is conveyed as falls strictly within the express provision of the statute, and such as would at all times, and in every court after this statute, have passed the legal estate to the *cestui que use*.

A second mode of creating a trust, not executed by the statute was, where the feoffees to a use were directed to receive the profits and pay them over to the person intended to be benefitted. In such case, as the *cestui que use* could receive nothing but through the hands of the trustees, the legal estate was considered as being in them.

But where the devise was to permit the *cestui que use* to receive the rents and profits, there the legal estate would vest in him by the statute. The case of *Broughton*

against *Langley*, (1 *Salk.* 678,) illustrates this position. Lands were devised to trustees and their heirs, to the intent and purpose to permit A. to receive the rents and profits for his life. Lord Chief Justice *Holt* said, that this would have been a plain trust at common law, and that what at common law was a trust of a freehold or inheritance, is executed by the statute which mentions the word trust as well as use. In the case of *Chapman vs. Blissett*, (*Forrest*, 145,) where one of the questions was, whether the trustees took the legal estate. Lord *Hardwicke* says, "If an estate be limited to A. and his heirs in trust for B. and his heirs, then it is executed in B. and his heirs. But where particular things are to be done by the trustees, it is necessary that the *estate* should remain in them, so long at least as those particular purposes required it. (See 1 *Cruise's Digest*, 463.)

Let us apply these instances to the case under consideration.

Is there any thing in the structure of the clause in the will of *Henry Laurens* evinsive of an intent on the part of the testator, that the legal estate should remain in the trustees? Not one word is said about their receiving the rents and profits, and paying them over to the *cestui que use*; no debts are to be paid out of this fund; no purpose whatever is expressed, whereby it might be inferred that the legal estate was intended to remain in the trustees. They are simply required to hold to them and their heirs to the use of the devisee. The statute therefore, according to the opinions both of Lord *Holt* and Lord *Hardwicke*, executes the possession to the use, and gives the legal estate to the *cestui que use*.

The third direct mode of creating a trust, not executed by the statute is, where a term for years is granted to one to the use or in trust for another. The legal estate in such case will not be executed by the statute in the *cestui que use*. The reason assigned is, that no one can be said according to technical rule, to be seized of a term—*seisen ex vi termini*, importing a freehold, and the words of the

statute being—"When any person is seized to the use of another's." But this branch of the law has no relation to the clause of the will under consideration, the devise being of a freehold nature.

There are other cases of trust estates arising from the nature of the transaction, and the evident intent of parties. The statute of frauds and perjuries has reference to such. It enacts that all declarations and creations of trusts of lands or hereditaments must be in writing; but excepts from the operation of the act, all such conveyances where trusts and confidences shall arise or result by implication of law. (*See S. 20, of the Statute.*)

It would be a perversion of every rule of construction to say, that the legal estate was intended to vest in the trustees by the clause in the will of *Henry Laurens*, and in direct opposition to the authorities on the subject, both in law and equity, and would be making the statute of uses to all intents and purposes a dead letter. The will throughout is drawn with skill and ability; the utmost precision is observed by the testator in the structure of each clause, and in the disposition of his estate. Technical and apt words are used to denote his meaning. If the testator therefore had intended that the legal estate should remain in the trustees, he would have afforded a clear signification of such intention, by pointing out the reasons why he had resolved on having it so fixed. I think therefore the conclusion is inevitable that he had no such intention—that he well understood the legal effect and operation of the words used by him, and that his intent would be violated were a different interpretation to be put upon the clause than the one I have adopted.

One of the counsel for the plaintiff, in the argument of this question, contend that as the statute of uses preceded the statute of wills, it could not extend to estates created under a power that had no existence until the latter statute imparted it. In confutation of this idea, I refer to Mr. *Powell's Treatise on Devises*, pages 271-2-3-4 & 5. 2 *L. Raymond*, 875. 12 *East*. 455. 3 *Bos. & Puller*, 175.

Independent of the view thus taken of the law arising upon the devising clause in this will, in which I am supported by a majority of the court, I confess that I feel myself strongly supported in the correctness of my opinion by the last quoted clause in the will. The testator there constitutes and appoints Doctor *Ramsay* and his wife guardians and *trustees* of his grand daughter, until she shall be of age to receive her estate.

These expressions, to my mind, are full of meaning: He had, in a previous clause constituted them trustees, respecting the lands devised: In this clause they are constituted guardians of her person—both of which, it would seem, the testator intended should cease on her arriving of age, at which time he declares she was to receive her estate. As my brethren, however, entertain doubts as to this clause and rather incline against the construction I am disposed to put upon it, I deem it unnecessary to dwell upon it.

The motion to set aside the nonsuit is refused.

Bowie, for the motion.

Noble & Wardlaw, contra.

STATE vs. MONTAGUE.

After a prisoner has plead not guilty, and the jury charged, it is too late to move to plead a misnomer.

Where there are two or more distinct counts in an indictment, charging different and distinct offences, and punishable differently, a general verdict of guilty is bad.

IN this case, the defendant was indicted for trading with negroes, without the permission of their owners, and for receiving stolen goods. His name was *Montague*,

and not *Montague*, as was written in the indictment.—
The plea of not guilty was filed ; but after the jury were charged, a motion was made in behalf of the prisoner to plead a *misnomer*, which was refused.

The jury returned a verdict of guilty.

A motion was now made for a new trial.

Mr. Justice *Huger* delivered the opinion of the court :

It is thought unnecessary to notice the several grounds taken in this case, on which the opinion of the court was delivered a few days since in the case of the *State vs. Williams*.

The grounds peculiar to this case, are,

1st. The refusal of the judge to permit the *misnomer* to be pleaded, and,

2ndly. The uncertainty of the verdict.

The defendant having pleaded the general issue, and put himself upon his trial, it was too late (when the jury was charged) to interpose a new plea. On this ground, therefore, the motion cannot succeed.

On the second ground, however, the motion must prevail. There are two distinct counts in the indictment, each charging the prisoner with a different and distinct offence. For each of which offences, the law has provided a different and distinct punishment. A general verdict of guilty, does not shew of which offence he was guilty. The judgment of the court, therefore, cannot be pronounced.

A new trial is ordered.

Justices *Richardson*, *Johnson*, *Gantt*, *Colcock* and *Nott*, concurred.

Clarke, Sol. for the motion.

Williams, contra.

DUKE GOODMAN vs. GEORGE PARISH.

P. gave G. an order to permit R. to have goods on credit, and he P. would be accountable. R. got goods of G. and gave him his note for them; upon an action by G. against P. for the price of these goods, the court *held* that G. was bound to prove that the note given him by R. had never been negotiated or paid.

THIS was an action to recover the amount of an account for goods furnished by the plaintiff to *Benjamin Robeins*.

An order or note addressed by the defendant to the plaintiff in the following words was produced, viz :

“ *Mr. Duke Goodman,*

Should *Benjamin Robeins* want any goods, on a credit, you will please let him have them, and I will be accountable.

ROGER PARISH.”

The plaintiff's book of entries was produced, in which the following entries were made—“*Benjamin Robeins*, dr. guaranteed by *R. Parish*—to goods,” &c.

Benjamin Robeins was credited on the date of the entries with a note for the full amount of the goods.

The note was not produced and not accounted for.

A verdict was rendered for the plaintiff.

A motion was now made for a new trial.

Mr. Justice *Huger* delivered the opinion of the court :

The goods were furnished on the credit of the defendant, who was to pay for them if *Robeins* failed to do so : When the goods were delivered to *Robeins*, his note was taken for the amount, no doubt to facilitate payment. It was negotiable and might be passed away by the plaintiff. It was a liquidation of the account, and might be more easily recovered at law, in the district in which the defendant lived, than an open account ; although the note cannot be regarded as satisfaction for the debt ; yet in as much

as it was negotiable, the plaintiff may have passed it away, and the note since been, in fact, paid by *Robeins*. If this note has been paid, the plaintiff ought not to recover, for his debt has been satisfied ; and whether it has, or has not been paid, must be best known to him.

The motion for a new trial must prevail.

Justices *Johnson, Colcock, Nott* and *Richardson*, concurred.

Miller, for the motion.

Lery & McWillie, contra.

CHARLES CANTEY, *et. al.* vs. DAVID PLATT.

When a writing is offered in evidence, so antiquated as to render it difficult if not impossible to produce a witness who had ever seen the person write, whose signature is in question, a comparison of hand-writing is allowable: So the signature of a receipt by the Surveyor-general, given 40 years back, may be proved by a comparison with his signature to the plats and grants from his office.

To make out a color of title, to show the extent of a party's possession, it is not sufficient to show a receipt from the Surveyor-General to the party for the fees of the grant, which was taken out in the name of another person, as the receipt might have been to him as agent for the grantee.

To enable a party to succeed in his statutory claim to land, he must prove that he has had possession of the land the full time required by the Statute ; he must show the extent of his possession, and that it was adverse.

Tried at Sumter, October Term, 1822.

THIS was an action of trespass to try titles to a tract of land in Sumter district.

The plaintiffs were the legal representatives of *Cantey*, who was in possession of the land in question before 1785, and continued in possession for 5 or 6 years after. *Crawford* obtained a grant for the land in May, 1785, and lived

in the neighborhood of it until 1786, when he left the state, and nothing had been heard of him since.

The land in question was uniformly called *Cantey's*, and was at one period planted in part by him; he however abandoned it about 4 or 5 years after *Crawford* left the state, but continued to live immediately in the neighborhood. After the land was abandoned by *Cantey*, for about 20 years, *Humphreys* planted it; he left it, and then one *Andrews* cultivated it for two years. Ultimately the defendant got into possession, and had resided thereon for 4 or 5 years.

The plaintiffs, to connect the possession of *Cantey* with the grant of *Crawford*, produced a receipt from the Surveyor-general, acknowledging that he had received the fees of office for *Crawford's* grant from *Cantey*.

The receipt, dated in '85, was proved by a witness, who admitted that he had never seen the Surveyor-General (*Ephraim Mitchell*) write, but that he had seen a great number of grants and plats, to which the name of *Ephraim Mitchell* was subscribed; and that the hand writing was the same. To this evidence, the defendant objected, but his objection was overruled, and the case was submitted to the jury, with a charge from the presiding judge, that the grant to *Crawford*, with the Surveyor-general's receipt, might be regarded as a color of title.

The jury found a verdict for the plaintiff, giving him all the land covered by *Crawford's* plat, from which the defendant now appealed, and moved for a new trial.

Mr. Justice *Huger* delivered the opinion of the court:

Two questions have been made for the consideration of the court:

1st. As to the admissibility of *Ephraim Mitchell's* receipt—and,

2dly. As to the possession of *Cantey*.

When a writing is offered in evidence, so antiquated as to render it difficult, if not impossible to produce a witness who had ever seen the person write, whose signature is

attached to the writing, justice would be defeated, if a comparison of hand-writing were not permitted. In the case of *Allesbrook & Roach*, (1 *Esp. Rep.* 351,) the jury were allowed to examine papers admitted to be the parties hand-writing, to compare them with the writing in question, and to draw their own conclusions. And in the case of *Brumand Rawlins*, (7 *East*, 232,) the signature in an entry, made by a person long since dead, was allowed to be compared with another signature of the same person, in a deed of settlement. So also, where a parson's books were produced to prove a *modus*, the parson having been long dead, a witness who had examined the Parish books, in which the same parson's name was written, was permitted to swear to the similitude of the hand-writing. (*Bull, N. P.* 236.)

In such cases, such evidence is the best that can be procured.

The signature of *Ephraim Mitchell*, a surveyor-general, forty years ago, could not be better proved than by comparing it with his signature attached to the plats and grants which were issued during the period he was in office. This objection cannot prevail.

A statutory claim to land, by possession, must depend upon the length, the extent, and the character of the possession. At best, land is held in this state by a too uncertain tenure. I have never met with an intelligent honest man, who did not regret that a trespass could be converted into a right in so short a period as five years. This evil can be remedied only by Legislative interference.

It is however the duty of this court to guard with vigilance such rules as have been established for the protection of the freehold, and not to permit so important a right to depend upon the whim and caprice, or the loose impressions of a jury. They are the judges of facts, not the manufacturers of facts. Their verdict to be good must be according to the evidence submitted, and not in opposition to the evidence, or without evidence.

To enable a plaintiff to succeed in his statutory claim

to land, he must prove that he has had possession of the land the full time required by the Statute Law.

He must shew the extent of his possession, to enable the jury to fix his metes and bounds, and his possession must moreover appear to have been adverse.

By the act of 1712, five years possession of land, if adverse, with certain exceptions not now necessary to be noticed, confers title. As *Cantey* could not hold adverse possession prior to the granting of the land, his possession must be regarded as having commenced at the date of the grant, viz. on the — May, 1785. One of the witnesses stated that *Cantey* was in possession 5 or 6 years after 1785. On this loose expression, referring to a possession which had ceased 30 years ago, depends the fact of *Cantey's* having been in possession five years subsequent to the date of the grant. Had no evidence of possession prior to the grant, and no neighborhood rumors as to *Cantey's* right to the land been submitted to the jury, or had the attention of the jury been directed to this loose expression, involving a fact so all important to the case, I should have been better satisfied with the verdict. As it is, I am unwilling to admit that a right so important, can depend upon a foundation so precarious. Did this case therefore present no other ground for a new trial, I should have been unwilling to refuse one.

On the second ground, however, the court are all of opinion the defendant must have a new trial.

Admitting that *Cantey* had possession of a part of this land for more than five years, subsequent to May, 1785, it was only a *possessio pedis*—it was not connected with *Crawford's* grant and plat.

There was no evidence to shew that he even possessed it at the time, and if he had the possession of a deed, proving beyond a doubt, that he was not the owner of the land, can afford no foundation for presuming that he claimed the land; the receipt of the Surveyor-general shews that *Cantey* paid the fees for *Crawford*—it does not shew that he got possession of the grant and plat, they may

have continued in the office for thirty years after. The plaintiffs not having shewn to what limits *Cantey* had claimed, was not entitled to a verdict for more (if to any) than he actually possessed.

On the third ground, it is only necessary to remark that the possession of *Cantey*, was at most, equivocal. The receipt of the Surveyor-general, if it prove any thing, shews that *Cantey* paid the fees of office, as the agent of *Crawford*. Any act done by *Cantey*, as the agent of *Crawford*, for the land, must negative the presumption, that he held adversely to him.

A new trial is ordered.

Justices *Johnson*, *Nott* and *Richardson*, concurred.

S. D. Miller, for the motion.

De Saussure & J. B. Miller, contra.

HERBEMONT vs. SHARP.

There is no implied warranty at Sheriff's sales.

In no case can a sale of lands be regarded as complete until the purchaser has paid his money and the seller conveyed the land.

A purchaser at Sheriff's sale, who has not received titles, may show that the title is not in the defendant, and that he represented to the sheriff that the land was his and induced him to sell it as such.

IN this case a *fi. fa.* had been lodged with the sheriff who levied upon a tract of land by directions from the defendant.

The land was put up and bid off by the plaintiff; immediately after, he discovered that the land did not belong to the defendant, he so informed the sheriff and refused to receive titles.

At the succeeding court, a rule was taken out by the defendant, and served upon the plaintiff to shew cause why

satisfaction should not be entered upon the judgment.

The plaintiff shewed for cause,

1st. That the title of the defendant was defective, and that he, (the plaintiff,) had not received titles for the same.

2nd. That the defendant knowing that the land did not belong to him, had fraudulently directed the sheriff to sell the same.

The rule was made absolute.

A motion was now made to reverse the order of the Circuit Court.

Mr. Justice *Huger* delivered the opinion of the court:

Had the plaintiff received a conveyance from the sheriff, he would have been bound, and this court could have afforded him no relief. For although the civil law rule of implied warranties has been adopted in this state, it was decided in the case of *Davis & Murray*, (2 *Con. Rep.* 143, and 2 *Bay*, 167,) that sheriff's sales form an exception to the general rule, and are coupled with no implied warranty. A sheriff's sale is now governed by the same rules as other sales of real property were anterior to the adoption of the civil law rule.

In the case of *Johnson & Johnson*, (3 *Bos. & Pol.* 168,) the chief justice observes, "the flaw having been discovered before the purchase was completed, there is no pretence the plaintiff bought the estate, and that having obtained the title for which he contracted, he must abide by the consequences. In no case can a sale of lands be regarded as completed, until the purchaser has paid his money, and the seller conveyed the land. The plaintiff in this case having received no conveyance, he was not bound, or was at liberty to shew that the title was not in the defendant, or that he was guilty of the fraud charged by the plaintiff.

In no case ought satisfaction to be ordered by the court, where the evidence of payment is not indisputable. In this case, if the allegations sworn to by the plaintiff can be substantiated, there was no payment. There was quite

enough, at least, to excite great doubts in the mind of the court.

The order of the Circuit Court must therefore be reversed.

The motion is granted.

Justices *Richardson, Johnson, Gantt, Colcock* and *Nott*, concurred.

McCord, for the motion.

Gregg, contra.



WILLIAM B. STOVER, *et. al.* vs. THOMAS DUREN, JR.

A defendant, who has neglected to file his schedule within forty days, can not take the benefit of the insolvent debtor's act; nor does the act authorize a jury to enquire whether the omission to file a schedule was fraudulent or not.

If a defendant has, within three months before his confinement, or at any time since, paid another creditor in preference to the plaintiff, the court may submit it to the jury, whether the defendant had preferred another creditor, but not whether the preference of one creditor to another is fraudulent or not; as the preference of one creditor *per se*, deprives the defendant of the benefit of the act.

THE defendant was arrested at the suit of the plaintiffs, upon a *ca. sa.* on the 25th of March, 1822.

The sheriff, on the 11th of April following, took security from the defendant for remaining within the bounds, and rendering to the clerk of the court a schedule of his property within forty days.

On the 8th of August following, the defendant filed a schedule, and then applied to the court for a discharge. The plaintiffs resisted this application on the ground that the defendant had not complied with the conditions prescribed by the act; in as much, as he had not filed his schedule within the forty days from the date of his bond.

and had subsequent to his arrest preferred another creditor. A witness was called to prove that the defendant had, subsequent to his arrest, paid him upwards of twelve dollars.

The court ordered a suggestion to be filed, which made two questions for the consideration of the jury.

1st. Whether the schedule had been filed within the forty days prescribed by the act—and

2nd. Whether the defendant had preferred another creditor to the plaintiff.

The judge, who presided, charged the jury to find for the defendant, should they be satisfied that he had not fraudulently omitted to file his schedule within the forty days, and had not fraudulently preferred one creditor to another.

A verdict was had for the defendant, who was therefore ordered to be discharged from this order. The plaintiffs appealed.

Mr. Justice *Huger* delivered the opinion of the court :

The act permits “a person in execution on any civil process,” to avail himself of the benefit of the rules, on his giving satisfactory security to the sheriff, (for the solvency of which security, the sheriff is responsible,) “That he will not only remain within the said rules, but will also, within forty days, render to the clerk of the court a schedule, on oath, of his whole estate, or so much thereof as will satisfy the execution, by force of which he was confined.”

If the defendant does not comply with this condition, (filing his schedule within forty days,) he is no longer entitled to the rules, (7th section,) and his bond is forfeited, (9th section.) Nor can he be discharged until he has fully satisfied the execution on which he was confined, if he has within three months before his confinement, or at any time since, paid another creditor in preference to the plaintiffs, or fraudulently conveyed any of his estate to defraud his creditors. The Judge is permitted, by the act,

to submit to the decision of a jury, whether the defendant has preferred another creditor to the plaintiffs, or whether the defendant has fraudulently conveyed away any part of his estate, but not whether the preference of one creditor to another was fraudulent or not. The preference of one creditor to another *per se*, deprives the defendant of the benefit of the act.

Nor does the act authorise a jury to enquire whether the omission to file a schedule was fraudulent or not.

The only questions which can be submitted are,

1st. Whether the defendant has been guilty of fraud?

2nd. Whether he has preferred another creditor to the prejudice of the plaintiff?

3rd. Whether he has made a false return?

4th. Whether he went without the prison walls, or prison rules, as the case may be?

As the jury were misdirected, the order of the Circuit Court must be set aside, and a new trial granted.

Justices *Johnson* and *Colcock*, concurred.

Justices *Nott* and *Richardson* :

We concur in this opinion, on the ground that no schedule was rendered according to the bond.

Levy & McWillie, for the motion.

J. C. Carter, contra.

ROBERTS, *et. alie*, vs. ISAAC ROBERTS.

A son may hold land adverse to his parent; however, in all cases the character of the possession is a question for the jury.

THIS was an application for the partition of the land of *Archibald Roberts*, deceased, among his heirs. The defendant had been in possession of a part of the land for fif-

teen years, which he claimed under the statute of limitations. The part he claimed was designated by lines known to the father of the applicants, and acknowledged by him. The court instructed the jury to find for the defendant, if they were satisfied that his possession had been adverse to his father, the time prescribed by the act. A verdict was accordingly rendered for the defendant.

A motion was now made for a new trial, on the ground that the possession of the son could not be adverse to the father.

Mr. Justice *Huger* delivered the opinion of the court :

There is no doubt that a son may hold adversely to a parent. Their intimate connection may support a presumption against the claims of the son, but this presumption may be rebutted by evidence.

In all cases, the character of the possession is a question for the jury. In this case, the evidence was conclusive, that the defendant held the land as his own, not as his father's. The jury have so found, and the verdict cannot be disturbed.

The motion is refused.

Justices *Johnson*, *Gantt*, *Nott* and *Richardson*, concurred.

Justice *Colcock* dissented.

Clendinen, for the motion.

James, contra.

JESSE TURNIPSEED vs. JOHN FREEMAN.

To substitute an office copy of a grant, in a case of trespass to try titles under the act of 1803, it is not necessary that the affidavit of the loss of the original deed should be made just before going to trial. But where the affidavit is sworn to subsequent to docketing the case,

for the purpose of being used in that case, and no circumstance independent of the lapse of time, appears to invalidate it, it should be received. The affidavit must be regarded as efficient from the time it is offered.

THIS was an action of trespass to try titles to land, called for trial at Columbia, in the Spring Court of 1822. To enable the plaintiff to substitute an office copy of the grant and plat, for the original, under the act of 1803, he offered an affidavit of the loss of the original, sworn to on the 9th August, 1820, when the case was first ready for trial. The defendant objected to the admissibility of the affidavit, as it had been sworn to some time anterior to the meeting of the court. This objection was sustained, and the plaintiff not being present to make another affidavit, was non-suited.

A motion was now submitted to reverse the decision of the Circuit Court.

Mr. Justice *Huger* delivered the opinion of the court :

The act of 1803, requires that the person applying to produce an office copy of a grant in evidence, 'shall swear that the original grant is lost, destroyed, or out of his power to produce, and that he has not destroyed, mislaid, or in any way willingly, previous to that time, put it out of his power to produce the same, with an intention to produce an office copy of the same in evidence, &c. The act nowhere prescribes the manner or time of swearing. The practice has been uniform to receive as evidence an affidavit of the loss, &c. If an affidavit be received at all, there appears to be no reason for requiring its execution at one period, rather than another, provided it be satisfactory as to the loss of the grant. It is true that what has been lost may be recovered ; but if the bare possibility of a recovery of the original be sufficient to invalidate an affidavit, one made a day, an hour, or minute before it is produced, would not be good. If such a possibility be regarded as too remote, at what point of remoteness is the mind to stop ? As we travel back, so will the possibility of reco-

very increase, until it be lost in the invisible boundaries, which divide what is highly possible, from what is remotely probable. The difficulty of deciding in cases of this kind, has led to the establishment of arbitrary boundaries: Hence our statute of limitations, and that rule of law, which presumes a bond paid, after 18 or 20 years.

In the case of *Creagh & Delane*, (1 *Nott & McCord*, 189,) a case arising under the attachment act, it was ruled that although the act declares that the plaintiff on filing his declaration, shall make oath to the debt; yet, that an oath taken some time prior to the filing of the declaration was sufficient. It is as possible that the plaintiff in attachment, should have received payment subsequent to the execution of his affidavit, and before the declaration is filed, as it is that the plaintiff in trespass should have recovered the original grant, between the execution of his affidavit and the trial of the case. In both cases, the affidavit must be regarded as efficient, at the time they are offered, although sworn to before.

I am satisfied that where the affidavit is sworn to subsequent to docketing of the case, for the purpose of being used in that case, and no circumstance independent of the lapse of time, appears to invalidate it, that it ought to be received.

The motion for a new trial is therefore granted.

Justices *Johnson* and *Colcock*, concurred.

DeSaussure, for the motion.

Gregg, contra.

THOS. IVES vs. CH. PICKETT, S. K. OATS, and RICHARD GRIFFITH.

A. & B. gave a joint & several note to C. afterwards, by agreement with A. & C.—D. signed his name to the same note, and C. then brought

an action against A. B. and D. upon their *joint and several* note, the court *Held*, that the plaintiff should fail, as his *allegata* and *probata* did not correspond. The note not being a *joint* contract by D. and A. & C.

THIS was an action brought on a joint and several note. The note had been originally signed by *Pickett & Oats*; some time after its execution, and without the knowledge of *Pickett*, *Rachel Griffith* signed it, in consequence of some agreement between the plaintiff *Oats* and herself.— The plaintiff declared upon a joint and several note by the three. The defendant contended that the plaintiff must fail, inasmuch as he had only proved a contract by *Pickett* and *Oats*.

The objection was overruled, and the plaintiff had a verdict.

A motion was now submitted for a new trial.

Mr. Justice *Huger* delivered the opinion of the court :

That a promise must be proved, as laid in the declaration, is not denied; but it is contended that the promise laid in this case has been proved. It is true that the plaintiff has proved that each of the defendants signed this note, but he has not proved that they jointly signed it. The evidence on the contrary, distinctly shews that *Pickett* not only did not jointly, with *Griffith*, sign the note; but that he knew not that it was signed by *Griffith*. He clearly made no contract jointly with *Griffith*, and this is distinctly charged in the declaration.

The declaration charges *Pickett* with having entered into a joint promise with *Griffith* and *Oats*. *Pickett* in his plea denies it, and the evidence supports the plea.

A new trial must be ordered.

Justices *Johnson*, *Nott* and *Richardson*, concurred.

Clarke, Sol. for the motion.

Williams, contra.

ELIJAH CABINESS vs. JOHN MAHON.

No excuse can be made for not recording a conveyance under the act of 1785, as to subsequent purchasers, and the only case in which a prior conveyance, not recorded, has been regarded as valid against a subsequent purchaser, whose conveyance was duly recorded, is where the subsequent purchaser had received *explicit* notice of the prior deed. Presumptive notice will not do.

Where adverse possession for 5 years is proved, a written muniment is of no other use than to shew the extent of possession.

THIS was an action of trespass to try titles to a tract of land in Laurens district.

The plaintiff proved a regular paper title from the original grantee of the land through *James Wright* to himself. The conveyance from *James Wright* to the lessor of the plaintiff, was dated in the year 18—, neither the plaintiff nor his lessor had ever been in possession of the land in dispute.

The defendant had been in possession of the land for 20 years prior to the commencement of the action. He went into possession under a duly executed deed of conveyance from *James Wright*, who was permitted to remain in possession of a part of the land for several years. In a short time after, the defendant went into possession of the land, by some means *Wright* got possession of his deed, and destroyed it. It was not recorded. *Wright* left the land several years prior to the commencement of this action, after having had much altercation with the defendant about it. Some evidence was given of conversations which had passed many years ago (prior to *Wright's* departure) between himself and the defendant, as to this land; but from the confused accounts of these old and loose conversations, nothing material to the issue could be collected. The presiding judge, in his charge to the jury, stated that the deed from *Wright* to the defendant, not having been recorded, the title of the plaintiff under the subsequent deed by *Wright* to the lessor of the plaintiff

must prevail. A verdict was accordingly rendered for the plaintiff.

A motion was now made for a new trial, on the ground of misdirection by the court.

Mr. Justice *Huger* delivered the opinion of the court :

The act of 1785, declares that all conveyances not recorded in six months after execution shall be legal and valid only as to the parties and their heirs, but shall be void as to subsequent purchasers, whose conveyances shall be recorded as the act prescribes.

The object of the act was the protection of purchasers against fraudulent conveyances. To admit as an excuse for not recording, the destruction of the deed, is to expose the purchaser to the very fraud against which the act was intended to protect him. The only case in which a prior conveyance not recorded, has been regarded as valid against a subsequent purchaser, whose conveyance was duly recorded, is that of *Tait & Crawford*, (1 *McCord's Rep.* 265, 479,) where the court declared, that if the subsequent purchaser had received explicit notice of the prior sale, his conveyance would have been held valid.— It is not pretended that the lessee of *Wright* had explicit notice of the prior conveyance to the defendant, but it is contended that the possession of the defendant ought to be regarded as presumptive notice of a prior conveyance.— But *Wright* was himself in possession, which raises as strong a presumption against the defendant's possession as his could against *Wright's*. If to *Wright's* possession be added the conveyance to him on record, there remains no ground for presuming that the lessee of *Wright* had notice of his prior conveyance to the plaintiff. But presumptive notice will not do ; it must be explicit, or the act will soon become a dead letter.

Had the jury therefore been instructed that the paper title of the plaintiff was superior to the defendants, and their attention been directed to his statutory claim by possession, this motion must have failed. But it appears

that the defendant's title by possession was regarded as contaminated by his paper title. That a party may succeed on his possession when he has failed to prove a paper title, is not now to be questioned. Where adverse possession for five years is proved, a written muniment is of no other use than to shew the extent of possession. The defendant had twenty years possession of this land. During the whole of that period he held adversely to *Wright*. The deed of *Wright* was unimportant to the defendant after the first five years, except to show the extent of his possession; and this might be done by evidence much less formal than a deed duly executed and recorded in the register's office.

The motion for a new trial is granted.

Justices *Gantt*, *Colcock* and *Richardson*, concurred.

Porter, for the motion.

Downs, contra.



JOHN CALDWELL vs. JAMES HARP.

Where the plaintiff issued a Summary Process against two who had signed a joint and several note, and *non inventus* returned as to one, the court *held* he might take judgment against the other.

THIS was an action on a joint and several note given by the defendant and *William Hays*, to the plaintiff. The original process had issued against both, but the sheriff had returned *non est inventus* as to *Hays*. On the part of the defendant, *Harp*, it was contended that the plaintiff, by issuing his process against both, had elected to bring a joint action, and could not, therefore, proceed against him until his joint payer, *Hays*, was made a party. The court allowed the plaintiff to discontinue as to *Hays*, and overruled the objection, and decreed for the plaintiff.

This was a motion to reverse the decree, on the ground that the plaintiff having commenced a joint action, could not proceed against one, and ought not to have been allowed to discontinue as to the other.

Mr. Justice *Johnson* delivered the opinion of the court :

This being a joint and several note, there is no doubt that the plaintiff might, if he had thought proper to do so, have proceeded against the defendant alone, but it is objected that the plaintiff having elected to proceed against both, cannot in any event proceed against one. I admit that the general rule in England is, that in actions in form *ex contractu*, when a plaintiff has elected to bring a joint action when he might have severed them, he must prove his case against all, or he cannot recover, and the reason of the rule is, that a defendant having notice of a joint demand cannot be supposed to come prepared to defend himself against one which is single. But a practice founded, I think, on principles calculated to promote the ends of justice, and so far as I am able to discover compatible with the general doctrine, has crept into our courts very long since of allowing the plaintiff to discontinue as to one of the parties, if he finds he cannot recover against him ; with the limitation, however, that it shall not be permitted to surprise or delay the defendant. (*Vide* the case *Dobbins vs. Helburn*, decided at Spring Term, 1821, 3 vol. *Mss.* page 4.)

The objection to the present case appears to me to have arisen out of the error of supposing that *Hays* was a party to this proceeding. He was never served with the process, and if the case had fallen within the general jurisdiction of the court, the declaration would have been against the defendant alone, and there is no doubt that he could not have protected himself by a plea in abatement for the *nonjoinder*, and by parity of reasoning, he cannot in this case. The process answers the double purpose of original process and declaration. The present is, therefore, only a declaration against the defendant.

The motion is discharged.

Justices *Huger, Nott, Richardson and Gantt*, concurred.

Bauskett & Dunlap, for the motion.
Caldwell, contra.

HANNAH HARDIN *and others vs.* JOHN KENNEDY.

In an action of trespass *vi et armis*, for breaking and entering the plaintiff's close and removing his fence, the necessary and unavoidable consequence of which was the loss of his crop, the court *held* the plaintiff might prove the loss of his crop to enhance damages.

TRIED at Chester, August Special Term, 1822.

Trespass *vi et armis*, for breaking and entering the plaintiff's close and taking away and removing 250 panel of fence, enclosing a field of seventeen acres. The plaintiff had a verdict.

The trespass was committed in December, and the only ground relied on for a new trial, on the part of the defendant, was that the court permitted evidence to go to the jury with a view to aggravate the damages, that the plaintiff lost the crop of the succeeding year in consequence of the removal of the fence.

Mr. Justice *Johnson* delivered the opinion of the court:

No objection was made in the court below or here, as to the admissibility of the evidence in reference to the form of the declaration. I take it for granted, therefore, that there is nothing in the proceedings which precludes it, if damages for the loss of the crop could be recovered in an action of trespass *vi et armis*. The argument in support of the motion proceeded on the ground that those damages were the subject of a special action on the case, and not trespass *vi et armis*. In this view of the subject, the point made, contains a proposition so self-evident that I find it difficult to illustrate it; for if in the action of trespass *vi et armis*, a plaintiff can recover damages at all,

it follows of necessity, that the injury which is the immediate consequence, is that which is to be redressed. If it were otherwise, most cases of trespass would be *damnum absque injuria*, and no action would lie.

It is not intended in the application of this principle to the present case, to advance the idea that the defendant would have been liable to damages resulting from all the remote consequences of the trespass, but that he is liable for the loss of the crop, if that was the necessary and unavoidable consequence of his removing the fence. Whether it was or not, was a question fairly submitted to the jury under this view of the law ; and their finding is conclusive.

The motion is refused.

Justices *Huger*, *Nott* and *Richardson*, concurred.

Justice *Colcock* dissented.

Clarke, for the motion.

Williams, contra.

J. I. GRACY & Co. *vs.* WILLIAM WRIGHT.
Executors of WATERS *vs.* WILKS B. WATERS.

Where a summary process is taken upon a note within that jurisdiction, but which, pending the action, increases by interest to an amount beyond that jurisdiction, the plaintiff may either take judgment to the extent of the jurisdiction, or he may declare and transfer the case to the general jurisdiction.

TRIED at Newberry, October, 1822.—These were summary processes on notes, the amount of which was within the summary jurisdiction of the court at the time the action was brought, but by the accumulation of interest pending the actions, the amount exceeded this juris-

diction at the time the cases were called for trial. On the part of the defendants, it was objected that the demand being above the jurisdiction of the court, the plaintiffs were not entitled to judgment. The court ruled, that under the circumstances, the plaintiffs had their election to take judgment for £20, the extent of this jurisdiction, or that the defendants being in court, they might declare and transfer the case to the general jurisdiction. They adopted the first alternative, and decrees were pronounced for them accordingly. And this was a motion to reverse them.

Mr. Justice *Johnson* delivered the opinion of the court :

If it were necessary, the most ample reasons might be given in support of the opinion expressed in the court below, as tending to the prompt and efficient administration of justice without prejudice to either party, and at the least possible expense. All that is necessary however to a rule of practice is, that it should be fixed and known.— The concurrence of the court in the opinion expressed in the court below is therefore all that is necessary for the purposes of the present case.

The motions are refused.

Justices *Huger*, *Gantt*, *Nott* and *Richardson*, concurred.

Bauskett & Dunlap, for the motion.

Oneal & Johnson, contra.

EPHRAIM PECK vs. WAKELY & WILSON.

Upon an agreement to refer matters in dispute to two arbitrators, "with power in case of disagreement to choose an umpire," the arbitrators may select the umpire before they act upon the reference.

An award that the plaintiff should give the defendant *sufficient indemnity* as to certain contracts, and should *indemnify* him against certain other supposed claims, is not void for uncertainty; but the words were held to mean, from the whole context of the award, the mere personal responsibility of the plaintiff, and not a bond, &c.

Tried at Richland, October, 1822.

DEBT on arbitration bond. The condition recited that "whereas there is a suit now pending in the Court of Common Pleas for Richland district, between the said *Ephraim Peck*, plaintiff, and the said *David L. Wakely*, defendant: and whereas, the said parties have agreed to refer all matters in dispute between them to their mutual friends *Samuel Guirey* and *Daniel Faust*, Esq's. with power, in case of disagreement, to choose a third person to settle and determine their differences, &c."

In support of this action, the plaintiff gave in evidence the following award. We, the undersigned, being called on to settle all differences and disputes between *E. Peck* and *David L. Wakely*, of Columbia, (S. C.) and late of New-Haven, (Con.) after mature deliberation, do award that the said *D. L. Wakely* pay to the said *Ephraim Peck*, the amount of four notes of hand given him, the said *Ephraim Peck*, as follows:

1 Note, dated 19th May, 1817, payable 1st December, 1817,	\$ 1030
1 do. do. 19th do. do. do. at 90 days,	600
1 do. do. 19th do. do. do. at 90 days,	286 39
1 do. do. 31st do. do. do. on demand,	282
	<hr/>
	\$ 2198 39

Making in all twenty-one hundred and ninety-eight dollars, 39-100, together with all interest legally due on the same up to the date, and the expenses that may have accrued by suit brought by said *Peck* on said notes to be equally divided; and we do further award that the said *E. Peck* do *indemnify* the said *D. L. Wakely* from all demands whatever that may hereafter come against the late firm of *D. L. Wakely & Co.* contracted in New-York or New-Haven previous to the dissolution of the said co-

partnership, and for the better securing the said *Wakely* against four notes of hand given by him to *Hubbard & Peck*, of New-Haven on the 26th and 27th September, 1816, amounting to twenty-one hundred and nine dollars, twenty-one cents, for a certain parcel of goods, which, according to agreement were returned to the said *E. Peck*, and which notes the said *E. Peck* declares to have been destroyed without the acknowledged cognizance of the said *Wakely*. We do award that the said *Peck* give sufficient indemnity to the said *Wakely*, that the said notes shall never hereafter appear against him : and we are of opinion that *Gad Peck* is responsible, should the said notes appear against *Wakely*, as the said *Gad Peck* has indemnified him against said notes, by letter bearing date 18th February, 1818.

D. FAUST,
S. GUIREY,
ALEX. HERBEMONT.

Columbia, S. C. April 25, 1819.

The plaintiff proved that shortly after the award was made and delivered, and before the bringing of this action, he tendered to the defendant a bond in the penalty of \$3000, with ample personal security for that amount, conditioned to indemnify him in pursuance of the award, and he refused to accept it, saying the security was insufficient, but whether in amount or the nature of the security, did not appear. Mr. *Herbement* acted with the referees at the reference, but it did not appear whether they had disagreed, or whether he was called on before or after a disagreement.

The plaintiff had a verdict for the amount awarded him, and this was a motion made on the part of the defendant for a new trial.

Mr. Justice *Johnson* delivered the opinion of the court :

The grounds of the present motion involve the following propositions :

1st. Whether the referees had, under the terms of the

submission, the power to call in an umpire before they had disagreed, and whether, in the absence of any proof, the fact of his being called in does not authorize the presumption of their having disagreed?

2d. Whether by the terms of the award, the plaintiff as a condition precedent, was not bound to give the defendant *security* to indemnify him against the demands on the firm of *D. L. Wakely & Co.* and the four notes given to *Hubbard & Peck*, and whether that tendered was sufficient?

3d. Whether the award was not void for uncertainty in not defining what indemnity the plaintiff should give the defendant?

As alike applicable to all of the foregoing propositions, it will be found that formerly awards were construed with great strictness. (*Kidd on Awards*, 228-9.) But this rule has given way to a more liberal construction. (*Kidd*, 230-11.) And the prevailing rule now is, that they are to be so construed as to give them effect, if possible.—(*Kidd*, 233, 243.)

In the application of the rigid rule to the first proposition, it would seem by the terms of the submission that the referees were restricted in the power to select an umpire in the event only of their disagreement, and consequently could not until that event happened. But when we come to enquire into the object of investing the arbitrators with this power, the necessity of a more liberal construction is apparent. Before the referees have investigated the subject of dispute between the parties, they cannot foresee their disagreement, and if they were to be restricted in the selection of an umpire to that event, they would be exposed to the danger of being governed in their choice by a knowledge of the prejudices or partialities of the person to be selected in relation to the matter of difference. It would be necessary too to enable the umpire to determine the disputed point, to hear from the original source the evidence out of which their differences arose, and would therefore subject them to a re-examination of

the whole case. It follows, therefore, that it is not only admissible, but desirable that he should be selected before they act upon the reference, in order to guard against the danger and inconvenience to which they would be exposed, if it was postponed until there was a disagreement.— (*Kidd on Awards*, 87.)

This disposition of this branch of the proposition puts an end to the second, as it follows that by the submission, the referees had the power of choosing an umpire at any time they might deem it necessary.

In the consideration of the second proposition, it will not be necessary to enter into the subtle doctrine of conditions precedent and subsequent, as it does not appear to the court necessarily to enter into the case. I shall therefore proceed to consider whether the plaintiff was bound by the terms of the award to give *security* to the defendant to indemnify him, &c. and as this enquiry will necessarily involve the third proposition, one general view will be taken of them both.

The arguments urged in support of the affirmative are predicated on the assumption of the fact, that in the words of the award, directing that the plaintiff should give the defendant *sufficient indemnity* against the four notes given to *Hubbard & Peck*, and that he should *indemnify* him against the demands that should thereafter come against the late firm of *D. L. Wakely & Co.* more was intended than a personal responsibility on the part of the plaintiff, if the defendant should happen to lose from these sources, and that the award was therefore uncertain and void, as it does not define what further act was to be done by the plaintiff, either as to the nature or amount of the indemnity to be given.

The conclusion of this argument is undoubtedly correct; for an uncertain award is void. The party is unable to perform it, because he does not know what is enjoined on him. I think, however, that there is manifest error in the premises from which it is drawn.

The term *indemnity*, as used in reference to the demands against the firm of *Wakely & Co.* and *indemnity*

as used in reference to the notes given to *Hubbard & Peck*, have pretty much the same meaning, and one definition will apply to both. To make sure, to protect from injury, &c. is the definition given to them, and if the defendant does do this, it is all the award enjoins on him, and thus far it is sufficiently certain, and it is only rendered uncertain by interpolating that the plaintiff must give security to perform the act. The words indemnify and indemnity may be controled by the context; they may, when taken in connexion with it mean only a personal responsibility; as when one says to another, "do this act, and I will indemnify you." Here it is apparent that a personal responsibility only was intended; but if he say, "I will indemnify you by a mortgage of my land, by sufficient personal security, or a deposit of goods if you will do the act," here it is apparent that more than a personal responsibility was intended. The word indemnify as used in the award, in reference to the demands against the firm of *Wukely & Co.* is unqualified by any thing connected with it; and if it be construed to mean that the plaintiff should give security to indemnify him, it would be void for uncertainty as to what that security should be; but by a liberal construction under the rule that it shall be supported, if possible, we come to the conclusion that a personal responsibility only was intended.

It was also urged in reference to that part of the award which requires that the plaintiff shall give sufficient indemnity to the defendant against the four notes given to *Hubbard & Peck*, the word indemnity is controled by those connected with it. I am inclined to think that by the application of the preceding rule to this objection, the same result would follow. It would seem from the words "give sufficient indemnity," when taken separately, that the arbitrators had in view some act to be done by the plaintiff; but they appear to have defined the meaning in which they used the word, when they, in reference to this very subject, declare it as their opinion that he is already indemnified by *Gad Peck's* letter; and this view, I

think, is also aided by the circumstances, that they have given no clue by which it can be discovered what was intended. There is however a more conclusive answer to this objection.

For the reasons before given, the idea that the award imposed on the plaintiff the necessity of giving security, is excluded; and if it be construed to mean that he should do some act by which the defendant was to be indemnified, it follows that it must be done by himself alone. No injury had resulted to the plaintiff, and all that he could do was to perpetuate the evidence of his liability when the loss should happen. This he did do by a bond tendered to the defendant, in a penalty sufficient to cover the amount of these notes; and whether the security was sufficient or not, was wholly immaterial, as he was not bound to give any, and the defendant's refusal to accept it was a folly of his own, which ought not to prejudice the plaintiff. The motion is refused.

Justices *Colcock, Nott* and *Richardson*, concurred.

Gantt, Justice, dissented.

Gregg & Stark, for the motion.

De Saussure & McCord, contra.



JOHN MILLER vs. DANIEL KERR.

It seems, a person may justify the speaking of actionable words, if he named at the time of speaking them, of whom he heard them, and if in truth he did hear them; but this rule is not intended to protect a defendant in the gratification of his malice, by taking shelter under a falsehood published by another; but it is a justification, only so far as it is evidence of the want of malice.

It is no justification to say one has stolen an article, and that he could prove that B. said so.

The same words, whether spoken before or after action brought, are admissible in evidence.

TRIED at York, August, Special Term, 1822.

Slander for the words, "he, (the plaintiff,) stole a cart tire and gets his living by stealing."—"He is a thief and will swear a lie." These words variously modified were the basis of all the counts in the declaration. The defendant pleaded the general issue, and a special justification, that he had heard the words from *Joseph Simpson*, and that at the time they were published, he also stated that he had heard them from *Joseph Simpson*. The plaintiff proved the words laid by one witness, without any qualification; and several others who were present at the same conversation, proved that the defendant spoke the words affirmatively, but superadded that he could prove that *Joseph Simpson* had said so; and several of the witnesses sworn by the defendant, and who were present at the same conversation, proved the publication of the words with the foregoing qualification.

Publication of the same words spoken, after action brought, was admitted in evidence.

The defendant proved by several witnesses that *Joseph Simpson* had repeatedly said that the plaintiff and his brother, stole a cart tire, and that it was commonly and publicly talked of at the time, which was twelve or fourteen years ago.

The jury found for the plaintiff \$500 damages.

The defendant moved for a new trial on the following grounds:

1st. Because the same words spoken after action brought were inadmissible.

2nd. Misdirection of the presiding judge in charging the jury that proof that the defendant gave his author at the time of publishing the words, did not support the justification pleaded, when the words were spoken affirmatively, or in other words, when the defendant affirmed that the fact was so, on the authority of his author.

3rd. Because the damages were excessive.

Mr. Justice *Johnson* delivered the opinion of the court :

Departing from the usual order, I will first consider the end. ground.

The general rule is, that it is no justification of slanderous words, that the defendant heard them from another ; for every one is answerable for the slander which he propagates, (2 *Esp. Dig.* 106-517.) The case of *Davis vs. Lewis*, (7 *Term. Rep.* 17,) has carved out an exception to the rule. In that case, the court says the defendant may justify, if, at the time of speaking the words he names him, from whom he heard them, and if in truth, he did hear them from another. The reason given is, that by giving the name of the original slanderer, the plaintiff has a direct remedy against the original wrongdoer. But the case of *Martland vs. Goldney*, (2 *East.* 246,) has given a limitation to the operation of this exception. To support the justification, the defendant must use the words of the original slanderer, so far as relates to the gist of the charge against the plaintiff. It follows, therefore, that the exception never was intended to protect a defendant in the gratification of his malice, by taking shelter under a falsehood published by another, but to protect one, who, without malice and for purpose necessary to the very existence of society, inquires into and investigates the characters of men ; and the true meaning of the exception is, that it is a justification only so far as it is evidence of the want of malice ; as when one, without any affirmation of the truth of the fact, states what he has heard from another, then the presumption of malice, arising from the publication of the slanderous words, is repelled by the occasion and manner of speaking ; but it will not hold good when, from the circumstances, it is manifest that the defendant used the words with an intention to defame the plaintiff, although he gave the very words, and the name of the author. As in this case, when the defendant took upon himself to affirm the truth of the words, then he is responsible for their truth upon what ever authority they may have been spoken. By so doing, he superadds his

own authority and influence, and inflicts a new injury, for which he alone is responsible.

In this case, the defendants own witness, independent of those adduced by the plaintiff, stated that he had affirmed that the plaintiff had stolen a cart tire, but added that he could prove that *Joseph Simpson* had said so. He did then give his sanction and the influence of his own affirmation to the propagation of a slander, and he is responsible for the consequences.

I shall next proceed to consider the first ground of the motion.

Malice is the very gist of the action of slander, and it follows of necessity, that all the circumstances which go to prove it, or from which it may be inferred, necessarily enter into it. It may, and is frequently implied from the words spoken, and this implication is strengthened or repelled by the occasion and manner of speaking, and all the variety of circumstances which could enter into such a thing; and there is, perhaps, no circumstance which more strongly marks the character as to the *quo animo*, than their frequent repetition. It is the evidence of a malicious heart brooding over its victim. On this principle, it was held in the case of *Challer v. Barrel*, (*Peake, N. P. 25*,) that words spoken subsequently to those laid in the declaration were admissible. Another case decided on the circuit, in this state, is recollected by my brother *Gantt*, which accords with this principle, in which, when the case was called for trial, when the charge was that the plaintiff was a hog thief, Mr. Justice *Grimke*, our late senior associate, permitted evidence to go to the jury, that the defendant said to the plaintiff, when preparing for the trial, "I will make the pigs squeal in your ears." It is clear, therefore, that the same words, whether spoken before or after action brought, are admissible.

The third and last ground involves no principle. The court do not see in the amount of the verdict, any thing

like that excess and outrage of public feeling which would justify their interposing.

The motion is refused.

Clendinen, for the motion.

Williams, contra.

Y. J. HARRINGTON vs. AARON WILKINS.

The possession of a slave, on lands, is not the possession of his owner; unless such possession was authorized by the owner; for to gain a right by possession, it must be such a possession as will enable the adverse claimant to sue.

The character of possession to land, whether adverse or not, is a conclusion to be drawn from all the circumstances, and belongs to the jury to decide. An adverse character may, and most frequently is implied from possession alone. So, when the person under whom the plaintiff claimed, had said, "I am ignorant whether they (the defendants) have a right or not; I will not wrong them out of a farthing, and if their title appears, I will pay them for the land;" it was *held* that the possession was not such an adverse possession as would give title.

Tried at Union, Spring Term, 1822.

TRESPASS to try titles to land. The plaintiff derived his title from a grant to his father, *John Harrington*, dated in 1787. There was an old field on the place at the time, consisting of four or five acres, and the plaintiff proved that *John Harrington* had possession by his tenant, *William Harrington*, for two years, immediately subsequent to the grant. After this, the enclosure was reduced to the half or fourth of an acre, which was planted in cotton up to the death of *John Harrington*, in 1793, and thence up to the marriage and removal of his widow in 1795. But whether this small patch was plant-

ed by *John Harrington* and his widow, and for their benefit, or by one of their negroes for his own use, was doubtful from the evidence. Subsequent to this period, *Smith*, a son-in-law, and one of the executors of *John Harrington*, and who lived on an adjoining tract, was accustomed to make patches for sowing tobacco seed on a branch that ran through the disputed land up to the year 1800, since which, there had been no possession on the part of the plaintiff.

The defendant claimed under, and derived a title from a grant to *Matt. Porter*, which was much older than that under which the plaintiff claimed. He proved that *Porter* cleared and settled the field in which the plaintiffs had had possession before the Revolutionary war, and that in the time of the war he left it, and went into North-Carolina, where he died, so that the plaintiff's right to recover depended solely on his possessory title.

The claim of the heirs of *Porter* was known to *John Harrington*, the grantee, under whom the plaintiff claimed, and was frequently the subject of conversation up to the time of his death in 1793, and several of the witnesses stated that they had frequently heard him say, in relation to it, that "he would not wrong them out of a farthing, and that if they would produce a grant and establish the lines, he would pay them for the land, or buy it of them."

The jury found a verdict for the defendant, and a motion was made for a new trial, on the following grounds:

1st. That the plaintiff made out a good and sufficient title in law under the statute of limitations, and was entitled to recover.

2d. Misdirection of the court in the following particulars, viz:

1st. In charging the jury that if they found that the possession of the small patch was the possession of *John Harrington's* slave, that possession could not enure to his benefit, unless it appear it was authorized by him.

2d. In charging the jury that if they should find on the

declaration of *John Harrington's* reasons to induce the conclusion that it was his determination not to use his possession in opposition to the better right of the heirs of *Porter*, if that should appear, or that it was his intention to hold subject to that title, such possession could not enure to the benefit of the plaintiff.

Mr. Justice *Johnson* delivered the opinion of the court:

The grounds of the present motion involve two questions:

1st. Whether the possession of a slave is the possession of the owner, unless it appear that such possession was authorized by the owner, and,

2dly. Whether the possession of one, claiming under a bad title, with the avowed intention of holding, subject to a better title if it should appear, is or is not adverse?

1st. In remarking on the first of these, I shall assume the positions, that to give right by possession, it ought to be such a possession as will enable the party claiming adversely to sue, (*Bailey vs. Irby*, 2 *Nott & McCord*, 343,) and that the owner is not answerable for a trespass committed by his slave, (2 *Bay's Reports*, 345,) unless it be done under his authority. It was doubtful from the evidence in this case, whether the possession of the small patch was the possession of *John Harrington*, or the possession of his slave. If the slave's, there was no evidence that he ever authorized it; and from the positions laid down, it follows as a necessary consequence that an action could not be maintained against him for this trespass, and therefore could confer no right on him. And whether this was or was not such a possession, was a question submitted to the jury.

As introductory to the consideration of the second question, it is necessary to premise, that laying aside all other considerations, the possession of *Smith* wanted the permanency and notoriety necessary to give it effect as an adverse possession, (*vide Bailey vs. Irby, supra*,) and to

make out five years possession, it was necessary, with the two years possession of *John Harrington* by his tenant, to make out three years of a possession, concerning which, as before remarked, there were doubts whether it was his or the unauthorized possession of his slave. If his, then the second question propounded arises.

That a possession adverse to the claim of the rightful owner is necessary to give title, is a legal axiom that will not be controverted; but whether it is or is not of that character, is a conclusion to be drawn from all the circumstances, and belongs to the jury to decide. An adverse character may and most frequently is implied from the fact of possession alone, or it may be marked by the most unequivocal circumstances; as when one forcibly expels another, and takes and maintains the possession, and for the same reasons, a possession apparently adverse, may assume an opposite character, when taken in connection with the circumstances. Thus, where one entered under an agreement to purchase, (*Jackson vs. Bard*, 4 *Johnson's Rep.* 230.) So, to make a possession adverse, it must be hostile in its inception. (*Jackson vs. Waters*, 12 *Johnson's Rep.* 365.) So the repeated applications of a defendant in ejectment to the lessor of the plaintiff to purchase the premises from him, affords a presumption that he came into possession under him, and repels the presumption that it was adverse. (*Jackson vs. Hasbronch*, 12 *Johnson*, 213.) It follows therefore that it is in the power of the party in possession to give it what character he please, either the most hostile, or its converse. What then is the character given by the plaintiff's grantor to his possession? The language which he holds in relation to the claim of the heirs of *Porter* is, "I am ignorant whether they have a right or not, I will not wrong them out of a farthing. If their title appears, I will pay them for the land," plainly implying that he could not submit to convert a rigid rule of law into an instrument of injustice. This language is in accordance with the principles of natural honesty, and it would be an

outrage on common sense to give it effect in such a manner as to compel him to be unjust contrary to his will.

Independent therefore of the finding of the jury, which I should regard as conclusive, on a doubtful question, the facts in this case leave no doubt in my mind as to the correctness of their conclusion.

The motion is refused.

Justices *Gantt*, *Huger*, *Colcock* and *Nott*, concurred.

O'Neal, for the motion.

———, contra.

JOHN BLACK vs. THOMAS SHOOLER.

A. made an assignment under the prison bounds act to B. "and other creditors," *held* that the assignment was to B. alone, the words, "other creditors" being void for uncertainty.

A merchant may prove his book entries in any case where it becomes necessary to have them proved.

A debtor has the right to apply his payments to whatever debt he pleases; so where A. sued B. upon a note, B. contended that he had agreed with A. that C. for whom he was working, should pass his wages as they became due, to the credit of this note; it was *held* a sufficient reply that the wages had been regularly, during the work, passed to the credit of a book account, to C. created during the time B. worked for C. consisting of small items from day to day.

THIS was a summary process on a note given by the defendant to *George Miller*, in which the plaintiff sued in the character of the assignee of *Miller*, who was an insolvent debtor. *Miller*, before the bringing of this action, had been arrested at the suit of the present plaintiff, and had taken the benefit of the act for the relief of insolvent debtors, usually called the "prison bounds act," and had made an assignment of his effects, including the note in question. On the production of the schedule and assign-

ment, it appeared to have been made by *Miller* to the plaintiff, "*John Black* and his other creditors."

It was proved, on the part of the defendant, that he had labored for *Miller* two or three months before the assignment to the plaintiff, at the stipulated wages of \$10 per month, which by the terms of agreement made before he began the work, was to be passed to the credit of this note, and this was insisted on as a discount. In reply to this, *Miller*, who was a merchant, was called to prove that this credit was passed to a book account, created during the time he was at work, and from the book of entries, it appeared to consist of small items from day to day, amounting to a sum equal to the price of his wages. Another witness stated that in a conversation between the defendant and *Miller*, he heard the latter tell him that he must "refuse to let him have goods, as instead of paying that which he already owed he was going further in debt," to which he made no reply.

The presiding Judge decreed for the plaintiff the amount of the note disallowing the discount.

The following grounds were made in the court below and were renewed here in opposition to the plaintiff's right to recover.

For a non suit.

1st. Because the plaintiff should have sued in his own name, and not as assignee.

2nd. The assignment was void under the act, in as much as that act only authorizes the assignment to the plaintiff in the action, whereas this was made to him and "*Miller's* other creditors." At all events they should have been joined.

For a new trial.

1st. Because *Miller* ought not to have been admitted as a witness.

2nd. Because the discount should have been applied to the payment of the note.

Mr. Justice *Johnson* delivered the opinion of the court :

1st. As to the non suit.

Whether the allegation, that the plaintiff is the assignee of *Miller*, is intended as a *descriptio personæ*, or of the right in which he sued, there is no doubt about the truth of the fact, and I have never heard that the statement of a fact founded in truth could viciate a record, although it is some times useless, and in such a case it is considered as mere surplusage.

The 2nd ground is also unavailing. The act, it is true, directs that the assignment shall be made to the plaintiff, and this assignment is made in conformity to it, but it is objected that it is viciated by the addition of *Miller's* "other creditors." It is not necessary to enter into the consideration of the effect of an assignment to other persons than the plaintiff; it is sufficient for the purposes of this case, that this is in effect an assignment to the plaintiff alone, the addition of "other creditors" being void for its uncertainty. The principle is, I think, settled by this court in the case of *Duncan vs. Beard*, (2 *Nott & McCord*, 400,) where it was held that a grant to *Livingston and his associates*, was good as to him, but void as to his associates for its uncertainty.

As to a new trial.

1st. There can be no doubt about the competency of *Miller* to prove his book entries. He may do so as a merchant, in a case to which he is a party, and it follows as a necessary consequence that he may do so in any case in which it becomes necessary to prove them.

2nd. When a creditor has several demands against the same debtor, it is the right of the debtor to direct the application of his payments to which he pleases, and their destination cannot be changed but with his consent. And upon a superficial view of the facts in this case, it would seem that the defendants wages ought to have been passed to the credit of the note on which this action was brought, but on a more attentive consideration I think a different result will follow.

The wages were not due when the agreement was made, and were only anticipated ; so that in fact, no payment was made. Board, clothing, and other necessities might, under some circumstances, have constituted a precedent charge on this fund, and from the very nature of it, the net profits was all that could have been contemplated. So if the defendant had requested payment of a part of the accruing wages to answer other purposes, although this would not have been a direct recision of the contract to apply it to the note, it is necessarily so in effect. And when, as in this case, he was drawing daily on *Miller* for small sums, it may fairly be presumed that it was in reference to and on the credit of this fund, and implies his assent to that appropriation of it.

This view of the subject is aided by the consideration, that this debt was justly due to *Miller* either on the note or account, and the effect of granting the motion would only be to turn the plaintiff round to the commencement of a second action.

The motion is refused.

Justices *Colcock*, *Nott*, *Huger* and *Gantt*, concurred.

Johnson & McDowell, for the motion.

Gregg & Hunter, contra.

EZEKIEL BIRDSEYE vs. AMOS DAVIS.

When a contract stipulates for the performance of a condition, on the event of a contingency, the occurrence of which must be known to one of the parties, but not necessarily known to the other, it is the duty of him to whom it is known to give such notice to the other, as a sound discretion would dictate, under all the circumstances of condition to be performed, contiguity of parties, &c.

Tried at Union, Spring Term, 1822.

THIS was a *sum. pro.* on the following note, to wit :
 “On or before the 1st day of April next, I promise to pay

Ezekiel Birdseye, or bearer, forty five dollars, value received, in a clock which he warrants to run and perform well. If it does not, he agrees to make it, or furnish one that shall. Should it be my choice, he is to exchange it for an eight day clock with a looking glass, at one hundred dollars, &c." The note was given in November, 1820, and the defence set up was that the clock did not keep time.

The defendant proved that in a very short time after he purchased the clock, she stopped running, but from what cause, the witness having no skill in this matter, did not know, and still continued in that situation. He was unable, however, to prove that he had given notice to the plaintiff of this fact until February, 1822, about the time the action was brought, and fifteen months after the contract in a dispute between them. He then told the plaintiff the clock was good for nothing, and he might take her back. The plaintiff then offered if he would place the clock in the hands of a respectable gentleman, he would even then take her back, if on a fair trial, she did not keep good time. This the defendant refused to do.

On the part of the plaintiff, it was contended, that to enable the defendant to avail himself of this defence, he should have given notice to the plaintiff of her defects in a reasonable time after it was discovered, and the court being of this opinion, and that notice had not been given in a reasonable time, gave a decree for the plaintiff.

A motion was made to reverse that decree.

Mr. Justice *Johnson* delivered the opinion of the court :

The grounds taken in support of the present motion are very various, but they do not exist in point of fact or are resolvable into the single question, whether it was incumbent on the defendant to give notice to the plaintiff that the clock did not keep time, in a reasonable time after it was discovered?

In the construction of a contract, the intention of the parties to be collected from the instrument, (if in writing,)

should be constantly in view, and in their performance, good faith and fair dealing is always required. And from hence, I deduce the rule that when a contract stipulates for the performance of a condition on the event of a contingency, the occurrence of which must be known to one of the parties, but not necessarily known to the other, it is the duty of him to whom it is known, to give notice of it to the other: On this principle, it was held in the case of *Miller vs. Parsons*, (9 *Johnson*, 336,) that where a deed contained a covenant for such further assurance as the grantee or his counsel should reasonably devise; that before the grantee could bring an action for the breach, he was bound to devise such other assurance and to give notice thereof to the grantor, and allow him a reasonable time to consider of it.

- In this case, the plaintiff agreed that if the clock did not perform well he would make it, or furnish one that would. Now the clock was in the possession of the defendant, and its deficiencies were necessarily known to him, but not to the plaintiff who resided at some distance; and it was incumbent on him, according to the rule, to give notice to the plaintiff, that he might perform his part of the contract by making it keep time or furnishing one that would.

What would or would not be a reasonable time in which the notice should be given is not, as I am aware of, fixed by any rule, and must be left to the exercise of a sound discretion under all the circumstances; respect being had to the nature of the conditions to be performed, and the contiguity of the parties to each other; and for the purposes of this case, it is only necessary to observe that considering the nature of the contract and the situation of the parties, a notice at the expiration of fifteen months was not in reasonable time.

The motion is refused.

Justices *Nott, Richardson, Huger* and *Colcock*, concurred.

Justice *Gantt* dissented.

Herndon, for the motion.

Farnandis, contra.

THE STATE vs. WILLIAM McDONALD.

On an indictment for bastardy, it is unnecessary to allege that the child is likely to become a burthen upon the district, and that the defendant refused to enter into recognizance for its support, in pursuance of the act; and if such averment be made, it need not be proved. If the defendant did give such bond, he should plead it in bar.

Tried at Richland, October, 1822.

THIS was a prosecution against the defendant for bastardy. In addition to the allegation that the defendant was the father of the child, the indictment charged that it was likely to become a charge to the district, and that the defendant had refused to enter into recognizance in the penal sum of £ 60, conditioned for the annual payment of £ 5, for and towards the maintenance of the said child, omitting to add for "twelve years," made a part of the condition required by the act.

There was no proof that the child was likely to become a charge to the district, or that the defendant had refused to enter into recognizance, but the jury, under the direction of the court, found the defendant guilty, and a motion was made for a new trial, on the ground that proof of these facts was necessary; and in arrest of judgment, on the ground of the omission to add "twelve years," in the condition of the recognizance set out in the indictment.

Mr. Justice *Johnson* delivered the opinion of the court :

1st. As to the motion for a new trial.

The general rule is, that it is not necessary to aver in an indictment any fact or circumstance which is not a constituent part of the offence charged ; and if they are stated, they are regarded as surplusage and need not be proved, (1 *Chitty, Crim. Law*, 157, 232.) This rule applies with all its force to the objection that it was not proved that the child was likely to become a charge to the district. On looking into the act on this subject, (1 *Brevard*, 67,) it will be found that proof of that fact is necessary, only when the mother of the child is brought before a magistrate on the information of some other person. In that case, the informant must state that the child is likely to become a charge on the district, not as it has been insisted, as a constituent part of the charge against the defendant, but to authorize the magistrate to issue his warrant to apprehend the defendant.

In relation to the objection that it was not proved that the defendant had refused to enter into recognizance, it appears to me unnecessary to consider it in reference to the general doctrine, as the act itself has pointed out the only fact to be tried. The act provides that when the person charged with being the father, is brought before the magistrate, if he shall admit that he is the father, and is able to give the security required, but refuses to do so, then he is to be committed until he does so. But if he is unable to comply with the requisitions of the act, "or should he deny that he is the father of the said child or children, then, and in that case, a jury shall be charged either in the Court of Sessions or Common Pleas, to try the *question* whether the person so accused, *is or is not* the father of such child or children."

The only question authorized to be tried by the act, therefore, is whether the defendant *is or is not* the father of the child, and the averment that he had refused to enter into recognizance, is immaterial and unnecessary to be proved. It is not to be understood that a defendant could

be indicted and convicted after he had entered into the recognizance required by the act. On the contrary, I think it would be a good bar to the prosecution. All the power the court has over the subject is derived from the act, and that is confined to the trial of a single issue when it becomes necessary in the cases specifically stated, and it is incumbent on the defendant to exhibit any thing which he may deem necessary to his defence.

This view of the case supersedes the necessity of considering the motion in arrest of judgment. The averment that he had refused to enter into recognizance, was immaterial and is rejected as surplusage, and consequently any informality in setting out the condition follows it.

The motion is refused.

Justices *Richardson, Colcock, Huger and Gantt*, concurred.

Goodwyn & Holmes, for the motion.

Jeter, Sol'r. contra.

THE STATE vs. ALLEN WILLIAMS.

An indictment may well contain a count at common law, and another under a statute.

The caption of an indictment must set forth with sufficient certainty, the court in which the jurors by whom, and also the time and place at which, the indictment was found: So if it be at a special court, it should so be stated.

The court have the right to amend the caption of an indictment at any time; and in this case, gave leave after conviction, to state that it was at a special court, and gave a form for such caption.

The Constitution confers on the Legislature a general power to legislate, with only two classes of limitations; those that are directory, and those that are prohibitory; and there is nothing in the constitution that prohibits the Legislature from authorising the Judges to appoint special courts; nor is there any article that fixes the times

of the courts, or that regulates the manner in which they are to be provided for.

The Act of Assembly, providing for special courts "to try all cases that may be ready for trial, whether criminal or civil," does not mean to limit the powers of such courts to the trial of such cases only as may have been previously ready for trial; but such authority to hold a court of sessions, includes all the powers incident to such a court, and necessarily to indict, arraign and try a prisoner; and the act has provided for a grand jury for that purpose.

Tried at York, August, 1822.

A SPECIAL court was held at York in August last, in pursuance of the act of the 18th December, at which the prisoner was indicted, tried, and convicted of the crime of horse stealing.

The indictment commenced "at a Court of Sessions, &c. without setting out that it was a special court, and contained two counts. The first, charged the prisoner with stealing the horse, and the second, with being present, aiding and abetting *Henry A. Garvin*, who stole the horse. The verdict was "guilty on the first count."

A motion was made to arrest the judgment, on the following grounds:

1st. Because the indictment contained two counts—one under the act, and the other at common law, and was therefore bad.

2d. Because it was not set out in the caption of the indictment that it was at a special court.

3d. Because the act under which the court was held is unconstitutional and void.

4th. If the act is constitutional, the presiding judge has no power to enquire, hear, and determine criminal cases in the same term.

Mr. Justice *Johnson* delivered the opinion of the court:

1st. The first ground has not been insisted on in the argument, and it is only noticed, because it was not explicitly abandoned. Without adverting to the question whether the second count charges a statutory or common law offence, it will be sufficient to remark that the writers on

Criminal proceedings, not only regard it as legal to join a count at Common law with one on a Statute, but advise it as necessary, and the reason is that it is impracticable to discover in all cases, the precise nature of the evidence, and the grand jury cannot like the petit jury, separate a count and find *billa vera* as to part, and *ignoramus* as to the residue. (1 *Chitty*, 168, 248). They could not therefore on an indictment on a statute, find a true bill on evidence of an offence at common law, but must reject it entirely.

2d. The caption of an indictment must set forth with sufficient certainty, the court in which the jurors by whom and also the time and place at which the indictment was found. This strictness was required, that it might appear on the face of the indictment that the court had jurisdiction of the offence, that the jurors were sworn, and that the court was holden at the proper time. (2 *Hawkins*, P. C. 360—1—2—3.) And it will be found by a reference to the precedents that when courts were holden in vacation under special commissioners, it was usual to set out the commission at full length in the caption of the indictment.

The acts of the Legislature, regulating the sittings of the courts, have appointed the third Mondays in March and October for holding the court at York ; and so far as appears in the face of the indictment, the holding of the court on the second Monday in August was unauthorized, and consequently the prisoner was improperly put on his trial, and according to the reason given, it is bad—and although I do not clearly see the necessity of this strictness under the present organization of the courts, it is safer to adhere to the principle. Another occasion, and perhaps at a distant period, its propriety and necessity may be developed.

There is no doubt however about the right to amend the caption of an indictment at any time, and leave is therefore given to amend.

The following seems to me to conform to the principles laid down, (to-wit :) “ At a special Court of Sessions,

began to be holden in and for, &c. at, &c. on the — day of, &c. in the year, &c. in conformity with the Act of Assembly, in such case made and provided, in pursuance of the order of the judges of the Court of Sessions and Common Pleas.”

3d. The argument on this ground assumed the position that the power of fixing the time for holding the courts, was limited by the 1st sec. of the 3d art. of the constitution to the Legislature alone, and that the delegation of that power to the judges by the act of 1817, was a violation of it.

The constitution confers on the Legislature a general power to legislate with only two classes of limitations; those that are directory, and those that are prohibitory; you shall do this, and you shall forbear to do that. Now, neither this nor any other article of the constitution has fixed or pointed out the time at which the courts are to be holden, or the manner in which it is to be provided for; nor is there any prohibition on the subject. The Legislature is therefore let free to provide for it in the manner they may think the most adviseable.

4th. The act of 1817, authorizing the holding of special courts, provides and requires that the judges of the courts of Sessions and Common Pleas may, whenever they deem it necessary, order “a Special Court of Sessions and Common Pleas, to be holden in any district, for the purpose of hearing and determining all such causes, rules, and motions, whether criminal or civil, as may be ready for trial in the said court.”

The view taken in support of this ground was that by the words, *ready for trial*, was a limitation of the powers of the court to the trial of those cases, wherein all the steps preparatory to a trial had been before taken, and consequently that the prisoner could not be indicted and tried at this court. If this construction was to prevail, a special court would be worse than useless; a party, whether on the civil or criminal side of the court, could answer, I am not ready for trial, and deprive the court of its authority to try the cause. The authority to hold a Court of

sessions, includes in it all the powers incident to such a court, and necessarily the power to indict, arraign, and try a prisoner ; and the act itself as necessary to the execution of this power, has provided for the attendance of a grand jury.

Justices *Huger, Nott, Richardson* and *Colcock*, concurred.

Gantt, Justice, dissented.

Williams, for the motion.

Clarke, Sol. contra.

THOMAS GRUBBS *ads.* HENRY KYZER.

In a declaration for slander, it is sufficient to set out the substance of the slanderous words spoken : So it is enough to say, that the defendant had said that the plaintiff stole his potatoes.

It must be stated, that the defendant *spoke or published* the slanderous words.

Action of slander, tried before Justice *Johnson*, at Lexington, November Term, 1822.

THIS was a case of slander.

Verdict for the plaintiff.

The defendant moved the Constitutional Court in arrest of judgment.

1st. Because the first count did not set forth the slanderous words to have been spoken or published by the defendant.

2nd. Because the 2nd and 3rd counts did not set forth the particular slanderous words.

3rd. Because the 2nd or 3rd counts did not set forth that the slanderous words were spoken or published of or concerning the plaintiff.

Mr. Justice *Gantt* delivered the opinion of the court :

The first count alleges that the defendant intending to injure and slander the plaintiff, in a certain discourse which the defendant had with divers citizens *of and concerning* the plaintiff, certain false and defamatory words, to wit : He, (meaning the said *Henry*,) stole my (meaning the said *Thomas*,) potatoes and bacon.

This count in the declaration, it is admitted, cannot be maintained. It is not alleged that the words were *spoken* by the defendant, nor does it derive any support from the precedent which has been quoted from 1 *Richardson's Practice* in *K. B.* 109. There the charge as stated, is that the defendant having discourse with divers subjects concerning the plaintiff, &c. openly said, and with a loud voice pronounced of the plaintiff certain false and defamatory words, &c. Whether the defamatory words, therefore, were used by the defendant or by the citizens with whom he held discourse, is not to be collected from the phraseology used in this count.

The second count states that the defendant of his further malice against the plaintiff afterwards, to wit ; on the same day, &c. in a conversation which he had with divers citizens of and concerning the plaintiff, did falsely publish and declare that the plaintiff had stolen his potatoes, bacon, and flower, (meaning the potatoes, bacon, and flour of the defendant.)

The objections to this count are, that in it the particular slanderous words are not set forth, nor is it stated that they were spoken or published of or concerning the plaintiff. The latter objection is certainly without foundation. It is expressly alleged that the words were spoken of and concerning the plaintiff. But as it respects the objection of the particular slanderous words not being set forth, I would observe that it is questionable whether such extreme precision in pleading of actions of this nature, should be countenanced by courts of justice. Formerly, when actions of slander were discountenanced, it is not to be considered that any rigid rules of construction were adop-

ted to favor what was considered a correct policy, which was to put down actions of this kind. Character at this day meets with better protection and is entitled to more regard and consideration. Under our happy government, its value is incalculable, and of course every protection which the law can afford should be extended for its preservation. Objections as to form merely, should never prevail in opposition to the justice of the case, for unless the party injured by false and malicious scandal, can meet with a prompt and efficacious remedy in making an appeal to the law, the consequences as respects the safety and happiness of the citizens, would be alarming. In the 2nd count of the declaration, the substance of the slanderous words used are given, and I do not consider it a clear and settled rule that a plaintiff is bound to allege expressly what particular words were spoken. In 1 *Binney*, 395, a count was determined to be good, which stated that the defendant spoke certain words in substance as follows, &c. In the case before us, the plaintiff does not profess to set forth the particular words, but he alleges the pith and substance of what was spoken by the defendant, maliciously to injure his character, and I am decidedly of opinion, that he has alleged enough to entitle him to a recovery, if his proofs maintain the allegation ; and that they do, the verdict of the jury affords conclusive evidence. In the *Digest of Massachusetts Reports*, page 575, letter D. as to the manner of declaring in an action of slander, it is said "that a general count in an action for defamatory words, as that the defendant charged the plaintiff with a particular crime, is good;" and in support of the position, the case of *Nye vs. Otis*, (8 *Massachusetts Reports*, 122,) is quoted. I am not for stuffing a declaration with matter not essential to the merits of the question to be tried : Where it is professed to set forth the identical words, still the party plaintiff, is not bound to prove them specially as laid ; it is sufficient in all cases to prove the substance of them, and this is in itself sufficient to show that to allege the substance of the words is quite enough. The *moda et*

forma of speaking them is nothing. The 2nd count, therefore, in the declaration, I take to be a good legal count, and sufficient to maintain the action. This view of the second count will render unnecessary any examination of the third count as stated in the declaration. The judgment cannot be arrested in this case, and the defendants motion must fail.

Justices *Johnson*, *Colcock* and *Nott*, concurred.

Gregg, for the motion.

McCord, contra.

CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, JANUARY TERM, 1823.—CHARLESTON.

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	RICHARD GANTT,
ABRAHAM NOTT,	DAVID JOHNSON,
CHARLES J. COLCOCK,	JOHN S. RICHARDSON,
DANIEL ELLIOTT HUGER.	

JOHN H. SARGENT *vs.* PAT. FOX.

A citation from the ordinary, giving notice of one's intention to apply for administration, need not be published in a newspaper; but it is enough, if read by an officiating clergyman in church.

ON the 26th July, 1821, the Ordinary of Charleston district granted letters of administration on the personal estate of *John Phillips White*, deceased, to the defendant. On the 13th of August following, the plaintiff gave notice that he would appeal to the Circuit Court, on the ground that the citation giving notice of the defendant's intention to apply for the administration, had not been published in some one of the newspapers in the city of Charleston. The ordinary certified that it was duly published by the officiating clergyman of the Roman Catholic Church: and the whole question was, whether the publication in the newspapers is indispensable?

The Circuit Court refused the plaintiff's application, and it was now renewed in the form of an appeal from that decision.

Mr. Justice *Johnson* delivered the opinion of the court :

I am not aware of any law that requires the publication of a citation in the newspapers, and none such has been adduced. The mode resorted to in this case has been immemorially and almost universally practised.

The motion must be refused.

Justices *Colcock*, *Nott* and *Huger*, concurred.

Sargent, for the motion.

White, contra.

HASLET *and others*, vs. STREET *and others*.

One copartner cannot authorize an appearance for the other.

Tried at Charleston, May Term, 1822.

THIS was an action against the defendants as copartners and proprietors of the Steam-boat "Charleston," on an account for supplies furnished that vessel. The service of the writ was accepted, and an appearance entered by Messrs. *O'Hara & Gibson*, as attornies for the defendants. When the case was called for trial, Messrs. *Cross & Gray*, in behalf of the defendants, moved to set aside the proceedings, on the ground that the acceptance of the service of the writ and the appearance were unauthorized by the defendants, and that they were therefore not in court.

The facts relied on in support of this motion were, that Mr. *Charles O'Hara*, one of the defendants, had authorized Messrs. *O'Hara & Gibson* to enter the appearance, but they were not authorized by any of the other defendants, and the whole proceeding was unknown to as many as seven of them, until about the time of the trial. These facts were not controverted by the plaintiffs, and the question propounded for the consideration of the court was,

whether one copartner can authorize an appearance for the firm ?

The court being of opinion with the plaintiffs in this question, rejected the motion : and on the trial of the case, a verdict was found for the plaintiffs ; and this was a motion to reverse that decision.

Mr. Justice *Johnson* delivered the opinion of the court :

In opposition to this motion, it has been insisted, on the part of the plaintiffs, that an appearance by an attorney of the court, whether authorized by the defendant or not, is sufficient to authorize the judgment of the court ; leaving the party injured to his remedy against the attorney ; and that one partner may authorize an appearance for all. To support these positions, 1 *Binney*, 214.—2 *Binney*, 145, and 6 *Johnson*, 296, have been relied on ; and on looking into these authorities, they are found to go all the length contended for by the plaintiffs. On general doctrines of law, I would weigh well an opinion opposed to these respectable authorities before its adoption, but in questions of practice, we must look well to our own, and ought not to depart from it, except for important considerations affecting the rights of the parties ; for in despite of all theory, every independent tribunal must have a *lex fori* adapted to their own peculiar situation.—With regard to the first of these objections, the usage has been directly opposed to it. The court has never refused to set aside the proceedings before the cause was tried, where the appearance was unauthorized by the defendant ; and when, as in this state, it is not necessary to file a warrant of attorney, or to do any other act to entitle an attorney to enter an appearance. The court ought to be circumspect in guarding against the abuse of this privilege, and the profession themselves are interested to prevent consequences alike injurious to themselves, and their clients, which would arise out of the practice contended for by the plaintiffs.

On the second objection, I think there is less difficulty.

The act of 1792, (*2 Brevard*, 170. *1 Faust*, 213,) provides, that in all actions for copartnership debts, where one or more of them, the copartners, are out of the state, or are dormant, it shall be sufficient to serve process on such as may reside or be found within the state, or upon such of the firm as are known ;” and suits so commenced, are declared to be valid and legal. It is not pretended that the question under consideration is expressly concluded by this act, but the analogy is so striking, and the principle involved so analogous, that they may be regarded as the same. The act recognizes the necessity of giving notice to all the firm, and provides only for cases where the process of the court is insufficient for that purpose. Now, if notice to one only was sufficient, it is as effectually done by serving as accepting the process, and the act was useless ; and I deduced from it the conclusion, that the practice before the act was to give notice to all within the reach of the process. It appears to me however, that both of these questions have been settled by the court in the case of *Keckly vs. Kern & Perry*, decided in Charleston, May Term, 1822, and although they are not propounded in precisely the same terms as those in which this case is presented, the opinion of the court is predicated on the view, that one copartner cannot authorize an appearance for the other, and in that case, as in this, an appearance had been entered by an attorney for all the defendants. The responsibility of a firm is in effect a joint contract, and it will not be denied that all parties to a joint contract must be sued. In joint and several contracts, those only are concluded by the judgment who are made parties by process. In any view of the case, I think therefore that the motion to set aside the proceedings ought to prevail, except as to the defendant, *Charles O’Hara*, who authorized the appearance, and this is the opinion of the court.

Justices *Colcock* and *Richardson*, concurred.

Nott, Justice : I consider this case as decided by the

case of Keckly vs. Kern & Perry, and therefore concur in the opinion that the motion ought to be granted.

Cross, for the motion.

King, contra.

Adm'r of H. W. LIBENINTZ vs. SAM'L A. GREENLAND.

Where a jury rejected a bond, *eleven years old*, as paid, and stated in court that they did so on account of obliterated marks upon it, which marks had not been observed by the opposite party or the court, a new trial was granted to enable the obligee to adduce evidence in explanation, and that he should not be surprised.

As a general rule, facts unknown to the court are not permissible to influence the finding of the jury.

Surprize alone, it seems, arising out of circumstances unknown to the party, and without his control, is of itself, sufficient to authorize a new trial.

Tried in Charleston, May Term, 1822.

The plaintiff's intestate had recovered a judgment against the defendant for \$930 14, which was entered up on the 20th February, 1813, and this was an action of debt brought by the present plaintiff on the judgment. The defendant gave in evidence, by way of discount, a bond made by the plaintiff's intestate to him, dated the 4th June, 1811, conditioned for the payment of \$700, with interest from the date. This discount was resisted by the plaintiff, on the ground of the presumption of payment arising from lapse of time and some other circumstances.

The jury found a verdict for the plaintiff, for the amount of his demand, disallowing the discount.

On coming into court, the jury stated that after they had retired to consider of their verdict, it was discovered that something had been written in pencil under the bond, which had been so carefully rubbed out that it was illegi-

ble, although some of the characters were visible, and that their verdict was founded on the suspicions which grew out of this circumstance.

Mr. Justice *Johnson* delivered the opinion of the court :

The motion of the defendant for a new trial is predicated on the general ground that the verdict is contrary to law and evidence. Less than twenty years is not *per se* sufficient to authorize the presumption of payment, nor does it appear to me that the circumstances relied on in aid of this presumption, would authorize it in so short a period as eleven years, unsupported by the suspicious and obliterated memorandum underwritten on the bond, by which the jury was controlled in their verdict. And if the case stood thus, I should incline to think that a new trial ought to be granted, the verdict being directly opposed to the evidence. For, cautious as the court is in interfering with the verdicts of juries arising out of facts, there have arisen, and will, as long as man continues frail, cases in which it would be iniquitous to refuse it ; and if this memorandum was rightly called in aid of the other circumstances relied on, I should hesitate in pronouncing for a new trial. The memorandum entirely escaped the vigilance of the council on both sides and of the court, and upon examination, it is found that to detect that any thing had been written on the bond, the eye must be directed to the spot, and even then, it requires great acuteness of vision to trace any of the characters ; so that it is no matter of surprize that it was not observed. It becomes then a question of some consequence, how far facts unknown to the court ought to be permitted to influence the finding of a jury. As a general rule, they are entirely excluded ; but in this case the memorandum was indorsed on the bond and constituted a part of the *res integra*, and was necessarily and properly before the jury, and could not, therefore, be excluded ; and in this view of it, the verdict might be supported. It is evident, however, that the detection of this memorandum has operated as a surprize on the de-

endant. If known, it was not incumbent on him to give explanations to a thing in itself unintelligible until it was used as a weapon against him ; and this was not done until the jury had retired and all communication with them was prohibited ; and the course the case had taken was unknown. If it had been made a ground of the defence in the court, the defendant might, by the introduction of evidence, have given it all the explanations it required, or the jury might have been instructed by the court in respect to its legal operation. Upon the whole, therefore, I conclude that a new trial ought to be granted, on the ground of surprize alone, to give the defendant an opportunity of explaining what he was not called on to do before, and which has operated so much to his prejudice. Surprize alone, arising out of circumstances unknown to the party and without his control, is of itself, sufficient to authorize the court to grant a new trial, and this is one of those extraordinary cases in which the court sees clearly that the fact on which the verdict is principally predicated, has not been investigated, and that without the fault of the party. It is better, therefore, to send it back for investigation, than to incur the risk of doing injustice by deciding on a partial view of the case.

The motion is granted.

Justices *Colcock*, *Nott*, *Richardson* and *Huger*, concurred.

White, for the motion.

Kennedy, contra.

C. F. MATHEWSON vs. DR. PHILIP MOORE.

To make out the proof of a return of *non est inventus*, in an action against the bail, it was held that the memorandum "N. E. I. per *Jackson*," and the following return : "I have, by my deputy, *John T. Smart*,

made diligent search for the defendant, but could not find him, *John R. Cleary*, sheriff," which purported to have been sworn to before one of the clerks of the Sheriff's office, and signed in the hand-writing of such clerk, composed a sufficient return, the Sheriff and *Jackson* both being dead, and no explanation to be obtained.

Tried at Charleston, May Term, 1822.

THIS was an action of debt on a bail bond, entered into by the defendant, as bail for *Sandoz*, in an action at the suit of the plaintiff. The plaintiff sued out a *ca. sa.* on the judgment obtained against *Sandoz*, on which the following memorandum was endorsed :

"N. E. I. per *Jackson*."

And also the following return :

"I have, by my deputy, *John T. Smart*, made diligent search for the defendant, but could not find him. *John R. Cleary*, Sheriff."

Which purported to be sworn to before Mr. *Chitty*, justice of the peace. The signature of *Cleary* to this return was in the hand-writing of Mr. *Chitty*, who, on being sworn, stated that he was one of the sheriff's clerks, and was accustomed, under his direction and authority, to make out and subscribe in his name, returns of the processes which passed through the office ; and without pretending to any distinct recollection of the particular case, had no doubt that such was the fact. *Smart* and *Jackson* were both deputies of *Cleary*, the Sheriff, and the two last had died sometime before the trial ; and *Smart*, who was called by the defendant to controvert the truth of the return, stated that he had no recollection that the *ca. sa.* was ever in his hands, as the return purported, and he was confident it was not, from the circumstance, that the memorandum "N. E. I. per *Jackson*," was in the hand-writing of *Jackson* ; and he drew from it the further conclusion that it had been in the hands of *Jackson*, and that he had acted upon it. The defendant also offered evidence to prove that the contract on which the original judgment in the case of the plaintiff against *Sandoz* was usurious, but it was rejected by the court.

A verdict under the direction of the court was found for the plaintiff, and the defendant moved for a new trial on the following grounds :

1st. Misdirection of the court in charging the jury that the return to the *ca. sa.* was good.

2d. Error in rejecting the evidence of usury.

Mr. Justice *Johnson* delivered the opinion of the court :

In order to charge the bail, the act requires that a *ca. sa.* shall be issued against the principal, and returned *non est inventus*; and hence, the contest in this case, whether this is or is not a true and sufficient return?

For the defendant, it is insisted, that the memorandum, “ N. E. I. per *Jackson*,” is no return, and that the truth of the formal return is controverted by *Smart*, the deputy, by whom the service is stated to have been performed.

It is not necessary to the purposes of this case to controvert the correctness of the first of these conclusions.— To say the least of it, the court would weigh well the consequences before it would lend its sanction to a practice so loose and equivocal, by giving to it a legal effect ; but as a private memorandum intended to assist the sheriff in making out formal returns, it is at most harmless, and may be useful. It is objected further, however, that the formal return is falsified, by the circumstance, that the search was not made by *Smart*, the deputy, by whom the return states it to have been done. This objection may be, and probably is, in fact, well founded ; but I think it does not follow that the return of *non est inventus* is falsified. The evidence of *Smart* is not a negation of the truth of the return, only so far as his agency is concerned ; but it does not follow that the service was not performed ; and that was all that was necessary to authorize the return. The Sheriff himself, or *Jackson*, or any other deputy was equally competent. And informal, and unclerical, as the memorandum, “ N. E. I. per *Jackson*,” may be as an official return, we know that it is used as an index to the return of *non est inventus*, and without attaching

further importance to it, all the difficulties on this point are solved. It proves that the service required was performed by *Jackson*, and justifies the return, and that the introduction of the name of *Smart* was a mere clerical mistake, from which the most circumspect are not exempted. The death of both *Cleary* and *Jackson*, who could have given the explanations which the circumstances furnish, is an additional reason for giving effect to this return. It will not be controverted that the judgment of the court is conclusive on the rights of parties and privies, and the rights of strangers are not affected by it, because they have no interest. Whatever, therefore, may be the relation in which the present defendant stood to the judgment in the case of the plaintiff against *Sandoz*, he is concluded, and the evidence offered to show that the contract on which that judgment was founded was usurious, was properly rejected.

The motion is refused.

Justices *Colcock*, *Richardson* and *Huger*, concurred.

Crafts & Eckhard, for the motion.

Cross & Gray, contra.

JOHN DUNCAN *ads.* MICHAEL BLOOMSTOCK.

On a motion being made to set off mutual judgments at the same court, during which they were obtained, the court granted the motion, notwithstanding the opposite party had assigned his judgment to a third person; the assignment being so promptly made, excited suspicion that it had been done to prevent a set-off.

It was also *held*, that a judgment recovered in an inferior court might be set-off against one of a superior court.

A verdict or judgment is not negotiable; the court will, nevertheless, respect an assignment of such where it appears calculated to promote the ends of justice; but not where it has a contrary tendency.

AT this term, the plaintiff, *Bloomstock*, obtained a verdict against the defendant, *John Duncan*, for the sum

of two hundred dollars. In July term, 1821, of the City Court of Charleston, the present defendant, as plaintiff, had obtained a judgment against the present plaintiff for two hundred and ninety one dollars. This was a motion to compel the plaintiff here to discount one against the other. The plaintiff resisted the motion on the ground that he had already assigned the verdict over to third persons.

The court overruled the motion.

This was an application to this court to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the court:

That mutual judgments may be set off, was decided at the last sitting of this court, in Columbia, in the case of *Williams & Evans, ante*, 203. In that case, it was said to be a part of the equitable jurisdiction of this court, and ought, therefore, to be so exercised as to do equity between the parties. The rule there laid down, was that the party wishing to avail himself of such a motion, must make it at the first court. And that if he delayed it until a succeeding court, and in the mean time the interest of third persons intervened by the assignment of the judgment or otherwise, it ought not to be granted. In this case, the mover has used all the diligence in his power. His motion was made at the same court at which the judgment was obtained against him. And the promptitude with which the other party attempted to transfer the verdict, is calculated to excite suspicion that it was done in anticipation of such a motion and for the purpose of defeating it. A verdict or judgment is not negotiable. The court will, nevertheless, respect such an assignment where it appears calculated to promote the ends of justice, but not where it has a contrary tendency. The only doubt in this case was whether a judgment obtained in one court could be set off against one recovered in another. But by looking into the authorities, I find them very satisfactory on that point. A judgment obtained in the Kings Bench may be set off against one obtained in the Common Pleas. And a judg-

ment of an inferior court may be set off against one of a superior court. (*Thrustout Ex dem. Barne vs. Crafter*, 2 *Blk. Rep.* 826. *Barker vs. Braham*, 3 *Willson*, 396. *Montague On Set off*, *App.* 7, 8. *Schermerhorn vs. Schermerhorn*, 3 *N. Y. Term Rep.* 190. *Simpson vs. Hart*, 14 *Johnson*, 75.)

The motion, therefore, must be granted so far as regards the amount of the judgments. But the court will not interfere with the costs. They belong to the attorneys and the respective officers of court.

Justices *Johnson* and *Huger*, concurred.

King, for the motion.

Crafts & Eckhard, contra.

~~—————~~

**MCDOWALL & BLACK vs. JNO. B. LEMAITRE, et ux.
Ex'or & Ex'ix of VANDERBURGH.**

A receipt, like any other paper, is to be construed according to its most obvious import, and will be considered final and conclusive between the parties where it purports to be so, except where some satisfactory and clear evidence shall be produced of error or mistake.

And after the death of the debtor, who made the payments, the court will not set aside a receipt in full, only from the circumstance that it appears on the plaintiff's books that the amount of goods charged after the date of a receipt prior to the one in question, to the date of the last, with the omission of one article, corresponded with the same mentioned in the last receipt, leaving a balance unpaid.

THIS was an action of assumpsit to recover the balance of an account of \$ 395. The defendant produced a receipt in full against the account, and contended that the plaintiff ought not to be permitted to controvert it by parol evidence. The presiding Judge, however, permitted evidence to be given of any error or mistake which would shew that the balance now claimed was still due. The

plaintiff's then produced their books and proved their account. It appeared that they had given credit for all the receipts produced by the defendants, which left the balance now sued for. There did not appear to be any error or mistake in the previous settlement except what might be inferred from the fact that the receipts produced, and for which credits had been given, did not amount to the sum of the goods purchased. The jury found a verdict for the plaintiffs, and this was a motion for a new trial on the grounds,

1st. That parol evidence ought not to have been permitted to contradict or explain the receipt.

2nd. Because the evidence was not such as to authorize the jury to find a verdict for the plaintiffs contrary to a receipt in full.

Mr. Justice *Nott* delivered the opinion of the court:

Permitting an account to be investigated which has been settled and closed by a receipt in full, appears somewhat like a violation of the rule of law that written evidence should not be contradicted nor explained by parol. But a receipt appears to be an exception to that rule. (*Tobey vs. Barber*, 5 *Johnson* 72. *Shaton vs. Ratsall et al.* 2 *Term Rep.* 366.) It is nevertheless not to be considered as no evidence, neither is it to be understood that an account so settled remains subject to the same proof only as before. On the contrary, a receipt like any other paper, is to be construed according to its most obvious import, and will be considered final and conclusive between the parties where it purports to be so, except where some satisfactory and clear evidence shall be produced of error or mistake. The plaintiff's account amounts to something upwards of \$1,000. They have given the defendant's testatrix several credits, amounting in the whole to something more than \$600, leaving a balance of \$395 as above stated. The defendants do not produce receipts to the amount of goods purchased of the plaintiff, but they produce one of the date of July 30th, which purports to

be in full at that time. It must therefore be so understood, unless some evidence to the contrary shall appear. The only circumstance to weaken the effect of it, is, that the amount of goods charged in the plaintiffs account after the date of a prior receipt up to the time of this, (with the omission of one article,) corresponds with the same mentioned in the receipt. But that is not sufficient to do away a writing under their own hands. It is further to be observed, that the plaintiffs are merchants, carrying on business on an extensive scale, and cannot be presumed to do business in this loose way. Indeed, the defendant's receipt book furnishes strong evidence to repel such a presumption. All the receipts are either general, for certain monies paid on account, or specify the particular bills, on account of which they were paid, except two. One is that now under consideration, which is for \$127, in full, and the other is of the 25th of October, of the preceding year, and which I presume was intended to close their dealings up to that time, as I observe the present account commences the 3d of November following. Those two receipts which seem intended as far as we can judge from the documents before us to close the accounts up to the time of their respective dates, are almost literally in the same words. It is further to be remarked, that the person to whom this receipt was given is now no more, and her representatives know nothing of this transaction, except what they have learned from the papers which she has left behind her. What estate might not be ruined, if complicated accounts might thus be unravelled, and receipts treated as waste paper? The object of a receipt is to put an end to litigation. It is the highest evidence and security which the estate of a deceased person can have against an unfounded claim. The money claimed by the plaintiffs may be due. If so, it is their own fault, if they lose it. But the rules of law cannot be relaxed for the accommodation of any individual. It is better that they should suffer this loss than that we should set such a precedent. There appears due to the plaintiffs a balance of

§ 54 18, for which they are entitled to a verdict. But a new trial must be granted, unless they will release the overplus.

Justices *Colcock, Gantt, Richardson* and *Johnson*, concurred.

Cross & Gray, for the motion.

Egleston & Hunt, contra.

WILLIAM ALLEN vs. JOHN POTTER.

On an action of assumpsit to recover the value of articles withheld, and to recover back money paid for such as were defective, in a purchase made by the plaintiff of the defendant, of a ship and many articles contained in her, it was *Held*, that the plaintiff ought to have produced the bill of sale as furnishing the highest evidence of the property conveyed by it, and of the covenants contained in it.

It seems to be the understanding that although a person may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and to show that there is no express covenant contrary to the implied warranty, on which his action is brought.

IT appeared in this case that the plaintiff had purchased a ship, tackle, guns, &c. of the defendant. It was alleged by the plaintiff that some of the articles which he had purchased had not been delivered, and that others were not such as they had been represented. This was an action of assumpsit to recover the value of the articles which had been withheld, and to recover back the money which had been paid for those which were defective in quality. After the evidence was closed on the part of the plaintiff, and the defendant had commenced his defence, it appeared that the defendant had given a bill of sale for the ship and other articles purchased. The defendant's counsel then called on the plaintiff to produce that bill of sale, and con-

tended that as it had been shewn that there was higher evidence in his possession, he ought not to recover on the evidence which had been given to the jury. The presiding judge was of opinion that the objection came too late, and that if the defendant wanted the bill of sale, he should have given the plaintiff notice to produce it. He was not taken by surprize, for he had given the bill of sale himself, and therefore knew of its existence. The objection was overruled, and the plaintiff obtained a verdict.

This was a motion for a new trial, on the ground, that it appeared in evidence that the contract between the plaintiff and the defendant was reduced to writing, and a bill of sale executed, the plaintiff could not maintain this action without the production of that paper.

Mr. Justice *Nott* delivered the opinion of the court:

This case was tried before myself; and if I had felt at liberty to exercise my own judgment, I should certainly have held that the action could not be maintained. It has been settled in this court, and I think, correctly settled, that where a person holds a deed, containing express covenants, he cannot maintain an action of assumpsit on an implied covenant of a similar nature. It has also always been my opinion, that where a deed contains certain express covenants, it excludes the implication of all others. But in the case of *Wells & Spears*, (1 *McCord's Rep.* 421,) it was determined by a majority of this court, that an express warranty of title did not exclude an implied warranty of soundness of property. I dissented from that decision. I nevertheless considered it obligatory upon me, and I thought it authorized the plaintiff to maintain the action which he had brought in this case, and that he was not bound to produce his bill of sale, without notice from the opposite party. My brethren, however, are of opinion that the decision in the case of *Wells & Spears*, did not authorize the conclusion which I drew from it.— It seems to be the understanding that although a person may maintain an action on an implied warranty of sound-

ness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and to show that there is no express covenant contrary to the implied warranty on which his action is brought; and as I was opposed to the decision itself, I am willing to concur in any construction which shall go to narrow it down as much as possible, as calculated to bring us back more nearly to what I consider to be the common law rule upon the subject. The great object is to render our decisions uniform and consistent. We have never departed from the rule that parol evidence shall not be admitted to contradict or explain a deed. We may have differed in opinion with regard to the application of it. The case of *Adams and Wylie*, (1 *Nott & McCord*, 78.) has been sometimes adverted to, to show that the court has disregarded that rule of law; but a reference to that case will show that the charge is unfounded. That was an action on two bonds given for a tract of land; the defence was, a deficiency in the quantity of land sold, and the question was decided upon the construction of the deed. The deed stated, as appears by the report of the case, "that the tract contained 294 acres of land, besides marsh." Upon a re-survey, there appeared but 202 acres of high land. Including the marsh, the whole number of acres was found, but the court held, that two hundred and ninety-four acres, besides marsh," must mean two hundred and ninety-four acres of high land. The terms of the contract appeared on the face of the deed, and did not depend upon parol evidence. In the case under consideration, the court are of opinion that the plaintiff ought to have produced the bill of sale as furnishing the highest evidence of the property conveyed by it, and of the covenants contained in it, and that he cannot maintain this action until he shall make it appear that it is not inconsistent with the terms of that deed. The motion therefore is granted.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

Toomer & Hayne, for the motion.

Hunt & Clark, contra.

MERRIT vs. C. P. L. WESTENDORF.

Upon an action for money had and received, against the defendant, it was averred, that he received it as vendue-master, which allegation was not replied to, and verdict was had for the plaintiff, *Held*, that the defendant was not thereby prevented at any time afterwards from taking the benefit of the insolvent debtor's act; for as the question whether he received it as vendue master or not, was not put in issue, he might waive the question at that time, and he has the right to make it whenever it becomes important to him.

THIS was an application to the City Court by *C. P. L. Westendorf*, for the benefit of the act for the relief of insolvent debtors. The application was resisted on the ground, that the debt for which he was in custody, was for money received on goods sold by him in the capacity of a vendue master, in which case he was not entitled to the benefit of the act. That question was submitted to a jury, who found for the petitioner.

A motion was now made to set aside that verdict, and for a new trial, on several grounds. But they may all be summed up in the general ground that the verdict was contrary to evidence. Another question however sprung up in the course of the argument, to-wit: That as the defendant was sued in the original action as vendue master, and failed to defend the suit, he had by his default admitted that allegation to be true, and that it was now too late to contest the point.

Mr. Justice *Nott* delivered the opinion of the court:

The case made in the court below, presented only a simple question of fact for the consideration of the jury, and the evidence was of that equivocal character as to furnish no ground for the interposition of this court. The other question is important, as it regards the future practice of the court. The vendue act subjects persons who are sued in that character for money, arising from goods

sold at auction to two disabilities—1st. They are not entitled to the imparlance which is allowed in other cases.— And 2dly. They are denied the benefit of the insolvent debtor's act. In the case of *Misroon vs. Freen*, (1 *McCord's Reports*, 38,) it was decided, that where a person who is sued as vendue master, would entitle himself to an imparlance, he must make it a preliminary question by denying the allegation that he had sold the goods in that character. And in the case of *Rocheblanche vs. Cleary and Gieu*, it was held, that the defendants had lost the benefit of that plea by pleading to the merits of the action. It was said however in that case, that it would be time enough to decide the question, whether the party was entitled to the benefit of the act whenever it should arise; thereby intimating that the party had not lost the opportunity of trying the question by not pleading to the original action, if at any further period it should become necessary.. And although it has been urged that a defendant, by making default, admits every material allegation contained in the declaration, yet the act authorizes the court to regulate the practice in this description of cases in such a manner as shall be best calculated to carry its provisions into execution. A person, although sued as vendue master, may not necessarily want the benefit of the insolvent debtor's act. The allegation therefore may be perfectly immaterial at the time. It may become important by subsequent events, whenever the defendant thinks proper to make the question in the first instance. I think the decision ought to be conclusive, both for and against him, if he should ever after apply for the benefit of the act; but if he is willing to waive it, I can see no reason why he should not be permitted to make it whenever it becomes important to him. It appears to me to be a convenient practice. It is calculated to do justice to both the parties, and to avoid unnecessary litigation. I am of opinion therefore that the petitioner was entitled to be heard.

and having obtained the verdict of a jury in his behalf, he was entitled to his discharge.

The motion therefore is refused.

Justices *Colcock*, *Johnson* and *Huger*, concurred.

Gudsden, for the motion.

Dunkin, contra.

ANTHONY PELZER vs. JAMES CRANSTON.

The books of a school-master regularly kept are not admissible to prove his account.

January Term, 1823.

TRIED before the Recorder of the City Court of Charleston, in October Term, 1822.

Mr. Justice *Colcock* delivered the opinion of the court:

The only question in this case is, whether the books of the plaintiff, who is a school-master, were competent evidence to prove his account on their appearing to have been regularly kept? The Recorder was of opinion that "the case of a school-master came within the principle of the authorities in this state, which decided that the original entries in books were *prima facie* evidence," and he, therefore, decreed for the plaintiff.

A motion is now made for a new trial, on the ground that the books were not evidence. It is certain the decisions have gone so far as to permit the books of others than merchants and mechanics to be given in evidence, but the court have always kept in view the necessity of the evidence. Now, there are few persons in business who are furnished with as many witnesses as a school-master may command, and there is no necessity for admitting his books to be produced in evidence. The decisions have

gone far enough on this subject, and the court are not disposed to extend the principle. They are unanimously of opinion that the books were improperly admitted, and that therefore a new trial must be granted.

Justices *Richardson, Johnson, Huger* and *Nott*, concurred.

Kennedy, for the motion.

Crafts & Eckhard, contra.

JOHN E. VAUSSE vs. E. RUSSEL.

Things fixed to the freehold cannot be distrained, much less a freehold, and of course a writ of replevin will not lie for a freehold illegally distrained.

Motion before Mr. Justice *Bay*.

IN this case, the defendant had issued a distress warrant against the plaintiff, who occupied a leased lot of land of hers on which he had built a house, for rent in arrear.— It was in the usual form, requiring the bailiff to take the goods and chattels of the tenant. The bailiff found no goods on the premises, nor any person in possession, and returned the warrant as levied on the house.

The plaintiff obtained a writ of replevin, by virtue of which he dispossessed a tenant who had been put in possession by Mrs. *Russel*, and on the return of the writ, a motion was made before Mr. Justice *Bay* to quash the writ, on the ground that replevin would not lie in such case.

On hearing the argument, the presiding judge quashed the writ, and a motion was now made to reverse the decision on the grounds;

1st. Because, being a writ founded on an actual levy for rent in arrear, it was a legal and appropriate action.

2dly. Because, if the proceeding was erroneous, it might, by pleading, be brought under the decision of the court in term time in the ordinary process of law.

Mr. Justice *Colcock* delivered the opinion of the court.

It has been a matter of great controversy and of some doubt in what cases a writ of replevin will lie; but this is the first instance within my knowledge of an attempt to replevy a house. The first ground assumes the position that because an illegal distress was made, that therefore a replevin would lie. Suppose the bailiff had found the tenant in the house, but no goods or chattels, and had invaded his personal liberty by levying the distress warrant on him, would the remedy by replevin be appropriate? And I should suppose it would as well apply, (and perhaps with more propriety indeed) in that than in the present case.— If any injury could result from such a nugatory act, the remedy would be by an action of trespass. It is expressly laid down by Mr. *Blackstone*, in speaking of the things which may be distrained, in the 2d volume of his *Commentaries*, page 9, that things fixed to the freehold cannot be distrained; and in the case of *Cresson & others, vs. Stout*, (17 *Johnson's Reports*, 106,) it is decided that replevin does not lie for things fixed to the freehold, until they be severed. It was said in the argument that it was a common practice to levy on houses built on leased premises in this city for rent in arrear. This may perhaps be the case by the convention of the parties, but nothing of that sort was proved. The object of the writ of replevin is to restore to the owner the possession of his goods, but here the effect of the replevin was to disseize the defendant of the freehold. On the second ground, it is only necessary to say that the point has been expressly decided by the cases of *Bird & O'Hanlin*, (1 *Con. Rep.* 401,) and *Cole & Gist*, (2 *Nott & McCord's Rep.* 456,) and with great propriety. When the process of the court has been thus illegally used, why should the remedy be delayed? Why suffer a proceeding to be carried on, which

it is obvious cannot be supported? As well might it be said, that where the service of a *capias ad respondendum* had been illegal, it should not be set aside on motion.

The motion is refused.

Justices *Richardson, Johnson, Nott & Huger*, concurred.

Gantt, Justice, dissented.

Bennett & Hunt, for the motion.

Toomer, contra.

ADM'R. OF FORBES vs. ADM'R. OF FOOT.

By the saving words in our statute of limitations, "beyond seas," is meant "out of the state."

Tried before Mr. Justice *Huger*, in May Term, 1822.

THIS was an action of assumpsit to recover balances due on several notes ; the first in time dated the 16th of January, 1804, and the last the 11th of June, 1806. The defence set up, was the statute of limitations. The plaintiff proved the hand writing of the defendants intestate to the notes, and gave in evidence an endorsement on each of them, made with the intestates consent, acknowledging the receipt of certain sums of money, in part payment of the notes. These were dated the 9th of August, 1814. The plaintiff, in order to take the case out of the statute, produced the following testimony : That *Asa Foot*, the intestate, formerly resided in Boston ; that in 1805, he became very much embarrassed and absconded from that city ; that he was brought back by a creditor and absconded a second time ; that he again returned to Boston and kept himself concealed and expressed his intention to do so ; that afterwards, he was absent ten or twelve years ; that witness considered him a transient person. He was in

the habit of trading to the West Indies. During the summer in 1810, witness met him in Barbadoes, and they visited in company, several of the West India Islands. In 1815 or 16, witness met *Foot* in Charleston.

• On the part of the defendant, it was proved by Mr. *O'Hara*, one of the plaintiff's witnesses, that he knew *Foot* three or four years during his residence in Charleston; that *Foot* arrived there in the spring of 1812 or 1813, about the commencement of the war; that he was a horse dealer and livery stable-keeper, and owned the livery stables in the rear of St. Philip's church; that he was generally in Charleston during the spring and winter; and in the summer traded to the West Indies; that this mode of life continued from 1812 or 1813, until his death, which occurred in the spring of 1817, and that he was correct in his dealings. It was also proved by the defendant, that *John Foot* administered on the estate of *Asa Foot*, the letter of administration being dated April 27th, 1817; that this was revoked and administration *de bonis non* granted to *C. W. Vankanst*, the present defendant, on the 27th December, 1817. The present action was commenced February 24, 1820.

Verdict was rendered for the plaintiff.

A motion was now made for a new trial on the following grounds, viz :

1st. Because the testimony adduced to take the case out of the statute, by shewing that the intestate was a transient person and concealed himself from his creditors at Boston, referred to a period long antecedent to August 9th, 1814, the date of the several acknowledgments on the notes, from which time the statute began to run, and the testimony was, therefore, irrevelent.

2nd. Because it was proved that the intestate resided in Charleston from 1812 or 1813, to the spring of 1817, when he died, and was a freeholder here; that an action might have been commenced in Charleston during all that time, whereas it was not brought until February 24, 1820, nine months and fifteen days too late.

3rd. Because the verdict was in other respects contrary to law and evidence.

Mr. Justice *Colcock* delivered the opinion of the court:

As to the facts of this case, the first enquiry is, when did the statute begin to run? And it is not disputed by the parties that it commenced its operation on the 9th of August, 1814. It is also conceded that the plaintiff lives in Boston, and has always resided there from the origin of this transaction. (The only question then for the determination of the court is, whether the saving in the statute in favour of persons beyond seas, can apply to the plaintiff? I think we are bound as well by reason as authority to say, that the words beyond seas mean out of the state or out of its jurisdiction. Many places literally beyond seas are nearer to us than the distant parts of the continent, and if four years are given to those who reside in the same place with a defendant to bring suit, it would seem but reasonable to extend the time to those who are at the distance of one thousand miles; and whether the intervening space was occupied by land or water is certainly immaterial. The idea of the law was, that those who had not ready access to the tribunals of justice should be allowed a longer time to commence their actions. But the point seems to have been well settled both here and in England. In the case of *Faw vs. Roberdeau's* executors, chief justice *Marshall* says, "beyond seas and out of the state are analogous expressions, and are to have the same construction;" (3 *Cranch*, 177;) and in the case of *Murry vs. Baker*, (3 *Wheaton's Reports*, 545,) Mr. Justice *Johnson* says "beyond seas' must be held to be equivalent to 'without the limits of the state;"—so in 2 *Johnson's Cases*, 81. By the act of 1789, commonly called the administrators law, nine months are allowed to the administrator to collect debts and arrange the affairs of his intestate's estate, during which he cannot be sued; and it was decided in the case of *Moses vs. Jones*, (2 *Nott & McCord*, 259,) that the creditor was entitled to four years exclusive of the nine

months, to bring his action against the executor or administrator. This time then is to be deducted from the ordinary time allowed to the plaintiff to commence suits. In other words, that in the case of administrators, the act of 1789, is for the period of nine months, a suspension of the act of limitations: It follows then that the verdict must stand. From the 9th of August, 1814, to 24th February, 1820, when this action was commenced, is five years and six months, from which nine months are to be deducted, which leaves four years and nine months, three months less than the five years given in the saving clause. The motion is, therefore, refused.

Justices Jonnson, Gantt and Huger, concurred.

Cross & Gray, for the motion.

Dunkin, contra.

THE STATE vs. DUPONT.

The principal who sends a challenge or fights a duel is embraced in the act of 1812.

The declarations of the second are admissible against the principal.

The provisions of the act that prohibits an offender from holding any office of honor, profit or trust, or of exercising any trade, profession, or calling, does not constitute a part of the sentence to be passed on one convicted; and whether constitutional or not, can only be determined upon a person so convicted attempting to hold any such office, &c.

Charleston, January Term, 1823.

THE defendant was indicted under the act of 1812, for sending a challenge. The verdict "guilty."

It appeared that the defendant was displeased with the evidence of the prosecutor in a case pending in the Court of Equity. It did not appear that the manner or words of the prosecutor had been such as were calculated to give

offence. The defendant was heard to say immediately after the examination of the prosecutor "that he should hear from him." The next morning Mr. *W.* waited upon the prosecutor with the following note—"Circumstances of a nature with which you are well acquainted, having transpired, some explanation on your part is required. If such be not given, my friend Mr. *W.* will make such arrangements as are necessary." Mr. *W.* when called on as a witness, on the part of the state, claimed the protection of the court, on the ground that he could not answer any question put by the attorney-general relevant to the case, without implicating himself. He was excused. The prosecutor stated that Mr. *W.* on being asked by him what was required, replied, that unless some satisfactory explanation was given, he (the prosecutor) must fight the defendant.

This declaration of Mr. *W.* was objected to by the defendant's counsel, but the objection was overruled.

The prosecutor further stated, that the note was immediately returned to Mr. *W.* and that on the next day he was posted by the defendant.

In the argument of the case, the defendant's counsel contended that the principal in a duel or challenge was not embraced by the act. The presiding judge was of opinion that the principal was embraced by the act, and so instructed the jury, who returned a verdict of guilty.

A motion was now submitted for a new trial.

Mr. Justice *Huger* delivered the opinion of the court :
In this case, these questions have been made.

1st. Whether the declarations of the second were admissible ?

2d. Whether the duelling act embraces within its prohibition the principals in a duel and challenge ?

3d. Whether the act be constitutional or not ?

Of these, the two first have been before decided by this court. In the case of the *State vs. Taylor*, it was ruled that the declarations of the second were admissible. And

in the case of the *State vs. Strickland*, the defendant, who was indicted under the act of 1812, for giving a challenge, was convicted, and appealed, and the appeal was dismissed. Several other cases have occurred. In all, the principal has been regarded as embraced within the sanction of the act. Were the phraseology of the act even less perspicuous than it is, I should be unwilling now, in opposition to those cases, to give it the construction contended for by the appellant's counsel. On the two first grounds, therefore, the appellant must fail. Whether that provision of the act which disqualifies a convicted offender against the act, from holding any office of honor, profit or trust, or of exercising any trade, profession or calling, be constitutional or not, is quite unimportant in the present case. The disqualification is not a part of the sentence of the court, no more so, than in a case of perjury, is it a part of the sentence that the defendant be forever disqualified from giving testimony in a court of justice. In both cases, the disqualification is a legal disability resulting from the conviction, and can only be tested, when in the one case, the offender shall be offered as a witness, and in the other an attempt shall be made to exercise a calling, practice or profession, or hold an office.

The motion must therefore be dismissed.

Justices *Johnson, Colcock, Richardson* and *Nott*, concurred.

MILLER & BROWN vs. SOUTH-CAROLINA INSURANCE COMPANY, et alias.

The protest of the Captain of a ship is admissible evidence in an action by the owners on a policy.

If a ship, within a day or two after her departure, become leaky and founders at sea, or be obliged to put back without any visible or adequate cause, to produce such an effect, the natural presumption

must be, that she was not seaworthy when she sailed ; and it will then be incumbent on the insured to *shew the state she was in at that time.*

Charleston district, May term, 1821.

THIS was an action brought for the sum of \$ 7000, being the insurance on the *General Armstrong*, from Charleston to Havana, at 2 1-2 per cent. premium, 2nd September, 1818.

John Michell, the mate, (the captain being dead,) stated that the vessel was lost by a leak occasioned by the springing of a butt ; that this had frequently happened to the best of vessels ; that he thought she was seaworthy, and that Charleston was as handy as any port, though there was not much difference between that and Savannah. Upon his cross examination he said he had seen, but knew nothing of the vessel ; the leak began a few hours after she left Charleston : She was laden with looking glasses and coffee boilers, and balasted with stone : The wind was from the north east when the leak began, and nearly so when they determined to run : He knew not if there was any other leak : They ripped off a part of the ceiling and removed the balast : Nothing but the starting of a butt could have admitted so much water : A part of the ceiling was a little rotten : He supposed she was not carried on the shore, because she was sharp built and would have gone on her beam end : He had no opportunity of knowing the sea worthiness of the ship, and that they anchored in safety.

The protest of the Captain, *Henry D. Hill*, written 14th September, 1818 ; 24 hours after his arrival, stated that the vessel was staunch, sound and well ironed, and that a butt was started in the garboard streak.

Captain *Butler* was next sworn. He stated that he was the surveyor of the Union Insurance Company ; he thought that after the vessel had received her out-fits she was sea worthy ; that he thought she would make water, having laid up for a long time ; she was a fine vessel in

1806 ; she had made one cruize as a privateer, and was a well built vessel ; he thought a little more was put on by the company to which he belonged, in consequence of his representations about the probability of her leaking. He repeated that he thought she would make some water for some days, but would arrive safe ; that it did happen to the best of vessels to start a butt ; particularly at the first voyage. He had known many instances : It was not likely to occur without stress of weather : The protest was read to him : He said he would not call that stress of weather ; that it was ordinary in that latitude, in that season. On his cross examination, he said that his opinion of the vessel was founded on a general knowledge of her from the time she came to Charleston ; that he saw her timbers laid bare above water, but not down to the keel ; she was an iron fastened vessel. She lay in Charleston port a great while ; he thought two years : She came from Wilmington, where she had been a long time. The copper would corrode the iron fastenings, let her lie where she would. It was probable this may have resulted in this case. That when a vessel is coppered, it is usual to put in additional copper fastenings. She was heavy rigged, though of great beam as a merchantman : It would have been better to have had less, though many now have as much. Her springing a leak so soon after she sailed, and in such weather, would seem to indicate that there was some defect which might have made her unseaworthy, and it was easier and nearer to go into Savannah. A north east wind would have carried her directly up to that place. He thought it a critical point and would not say whether he would have got her nearer in ; that he would not have run her on shore : He thought she cost at least \$7000, but he did not think she was worth it : He did not think that she would have brought more than \$3500 in Charleston, owing to the depreciation of that kind of property : She was about 11 years old.

Captain *Paine*, surveyor of the South Carolina Insurance Company, being duly sworn, deposed that he was

on board of her before she went into the hands of the ship carpenter ; that he did not inspect her bottom, but only her upper works ; that the timber which he did see appeared sound ; that he made no report of her bottom ; that she lay in *Chisolm's* dock for two years ; that he supposed the company knew it ; that she was what they call shipped, and that there was an old man on board as ship keeper. Upon his cross examination, he said that he saw some copper bolts which came through ; that he thought she was about 12 years old, according to the information he got from the captain ; that he should think a vessel springing a leak so soon, and in good weather, had been defective and not seaworthy : He should have thought it safer to have gone to Savannah. That four fathoms is pretty near in, and that if he had intended to run her, he would have run her plump on shore, if not, near enough : He knew no objection to her being run on shore : If a pilot had been with them, they might have been saved : She was French built ; which is strong built.

John F. Knox, a ship carpenter, said that he knew the ship *General Armstrong* ; she was in his hands in 1812 : He repaired her : She was French built : He did not examine her below the bends : He said he fitted her out for a privateer ; that his work was on her upper part : There was a part of the vessel which he found sound, *much heavier above* ; that he never examined her after that : He should have supposed her about 7 years old : She had an uncommonly fine frame. Upon his cross examination, he said she up set while lying between *Gadsden's* and *Easten's* wharves : He supposed she was in Charleston two years altogether : She sunk as they hove her down : She was a sharp vessel : He never knew her hove down keel out, and he had seen the iron fastenings destroyed in two years by the copper.

Mr. James Poyas was a ship carpenter : He stated that in 1818, this vessel was put into his hands by *Miller* ; *Henry D. Hill*, then being Captain ; that when he began to work, he found she had been worked on before ;

that he stripped her down to the waters edge and dubbed her, to see if she was sound, and found her so : He then stripped off three or four streaks below the waters edge, and found her perfectly sound ; that he did not believe he put in five feet of plank ; that the copper was well put on ; the paying sound : After taking off the above quantity of plank, Captain *Hill* and himself concluded that it was unnecessary to take off any more, because vessels were more apt to rot about light water mark than any where else : He examined the copper below, and found it in good order : He removed a part of the ceiling below the after hatch, (below light water mark,) and found the timbers strong : She had copper butt bolts, which he saw on the out side and bent down, which convinced him they were copper : If there had been iron fastenings, they had been hacked out and copper put in, and that lying in the water does not injure vessels copper ; this was the opinion of many : that during the embargo, many were laid up in that way ; that when he turned her out of his hands, he regarded her as seaworthy, and he thought that all who saw her thought so ; and that he coppered her again up to the wale. Upon his cross examination, he stated that there was a leak aft, near the stern port, which he stopped ; that there was a small part of a seam open : He did not know whether she had a false keel or not ; that vessels never rot below, for salt water preserves wood ; that it is common for vessels to start a butt, and it is impossible to tell from what cause it arises.

Mr. *Taylor* said, that to the best of his recollection she was ensured for less than she cost Mr. *Chisolm*.

On the part of the defendant, Mr. *Charles Cromwell* was examined. He said that he knew the ship *General Armstrong* ; that he sailed in her in December, 1812—that 8 or 10 days after he sailed from Charleston, she sprung a leak in a gale of wind, and that she made a great deal of water. Under the lower breast hook, the carpenter discovered it about four feet from the joining of the keel and stern. He had to cut away a part of the ceiling

and found the wooden end started ; stopped it so that she required to be pumped only once in two hours ; that they had a sort of an engagement with a British vessel, which lasted about two or three hours, and that she then had 3 feet water ; that in returning, they were chased off by the *Sappho*, a British ship, and that they went to Wilmington, got on the bar, grounded there, pumped out the water, and the next tide floated her and got in. That afterwards, at Charleston, she got a ground on an old wreck between Gadsden's and Johnson's wharves. He said he should think that she should have been overhauled completely before she went to sea. After the thumping on Wilmington bar, and the old wreck, she was carried into *Chisolm's* dock ; captain *Hill* called on him and asked if she had leaked with him, he told him that she did, and where the leak was. He, *Hill*, said that he had taken possession of her the night before, and that she had 5 feet water in the morning, which he had just pumped out.—The next time he saw her she was in the possession of Mr. *Poyas*, at which time she sunk, and the people on the shore cried out she was settling ; that *Poyas* told him the view of the owner was to be at as little expense as possible as she was fitting out for sale in the Havana ; that no doubt she should have been examined down to her keel, and all the copper should have been taken off ; and that he told *Poyas* of the leak. Upon being cross examined, he said he never had applied to captain *Hill* or the owner to be taken as mate, and that he had no enmity against Mr. *Miller*.

Captain *Williams* said that the night before she sunk he saw her, ran alongside, and got in. The captain said they were in a horrid condition, 7 or 8 feet water in the hold ; then begged him not to let his boat go away.—He hailed, and ordered her to stay. He saw some of her plank coming up ; the water was making in nearly as large as his body. The captain said he believed she was as rotten as spunk ; that the leak was forward, about the heel of the foremast, about the garboard streak. He made a mark, and found the water gained on her. He told the

captain that he might as well stop pumping, and go into about 3½ or 4 fathoms water, and by that means something might be saved. In four he anchored. He wanted to go into three. He wished her gunwales to be out of water; that she sunk about 12 o'clock the next day; that all night they transported things. The captain gave no reason for preferring four fathoms, but said that it was near enough; that the wind was North-East, and fair for Savannah, and that the captain wanted to run the vessel on shore. On his cross examination, he said that he saw some pieces of wood coming in with the water, but that he did not take them up to examine them, and would not have noticed them if the captain had not; that the captain appeared to be alarmed; that the leak was such a one as he should suppose would proceed from the starting of a butt; that the captain tried all he could to save the vessel; that no man could try more, and that there was no appearance of design in not going in nearer. He said that the vessel went down bow foremast, leaning on the side, carried by the anchor, and that her tops were under water. He thought the pieces of wood which came up were rotten; he then said he knew they were rotten. He did not think a good vessel in moderate weather would start a butt.—The wind was pretty fresh the day before. Their sails were reefed, and he also stated that a north east wind makes a heavy swell on our coast, and in the gulph.

Mr. *Stains* said he carried her out when she left this place; that the weather was moderate; that he continued on board for 5 or 6 hours, and that they crossed Charleston the middle of the day.

Mr. *Calhoun*, keeper of the Charleston Light-house, said that he saw a ship on the 11th sailing alone. On the 12th, she was at anchor; that he thought her too near the Folly Breakers; he went on top of the house, and came down to dinner; after which, he discovered she was down; that she went down about 12 or 1 o'clock, a good breeze from the north east. That two or three days after she went down, he took off a piece of the vessel with his hand.

Mr. *Sinclair* said that copper sheeting destroys iron fastenings; that originally she had iron fastenings; and he mentioned a case of a vessel built in Beaufort in 1808, which being examined lately, proved to have lost all her iron bolts; that she could not have resisted any violence. She was sheated with wood before the copper was put on. That there was an offer to sell this vessel for \$3000, by Mr. *Chisolm*. That the conversation was between Mr. *Chisolm* and himself, and that it was their calculation that \$1,500 more would be necessary to put her to sea. The log book of the ship thus remarks, "7th September, 1st day, moderate breezes, baffling winds, &c." 9th—Light breezes and pleasant weather, one pump constantly going, without intermission. At 8 P. M. tacked to the S. E. handed the square mainsail. Midnight, strong gales, attended with thunder and lightning, with a heavy swell; in all, small sails; double reefed the fore and main-top-sails; handed the mizen; the leak very fast, &c.

Mr. *Poyas* was again called; he said that he did not recollect ever telling *Cromwell* that the object of the owner was to sell and save expense; that he did not point out any leak to him, and that the vessel sunk from falling over, and so taking in water in the hatches.

Mr. *Shillock* was the mate of the *General Armstrong*, under Captain *Hill*, in August, 1818. He said he was on board about a month, that the vessel was tight. He raised her timber boards, and examined with his knife fore and aft. Would not give a spell of pumping in 48 hours; that he did not sail in the vessel because of a dispute; that *Cromwell* told him he asked for the birth of mate, and that he would have been willing to have gone round the world in her. Starting a butt is an accident which will happen to a good vessel; it happened to the British frigate *Narcissus*, while he was aboard of her. On being cross examined, he said he did not see all her timbers, nor all the ceiling ripped off, which was done by *Poyas'* hands. When the accident occurred to the *Narcissus* frigate, it was mild weather, and all thought the butt had

been badly fastened on at first. He said that when they took the fire wood on board, he remarked that it was bad ; that refuse rotten pine and oak were put into the hold of the vessel.

Mr. *Salter* said he knew the ship *General Armstrong* when she first came here in 1807 or 8—she was then a brig, but was made a ship during the war ; that he worked on her, and believes she was a good vessel. She was as tight inside as out, and that she was ceiled and corked ; and that in 1818, he again worked on her, and never saw any thing rotten about her.

John Belmore was a Rigger : He said that he rigged the *General Armstrong* completely : His bill was \$ 75 ; but before that, all he had done was by days work ; that he did not discover any wreck on which the vessel was, when he went to assist in getting her off, to bring her into *Chislom's* dock, and thought she was seaworthy at the time she sailed. Upon his cross examination, he stated that it was seventy or eighty fathoms to *Johnsons*, from where she was lying ; that she was between that and *Gadsden's* wharf, but nearer the first ; that the mate requested him, and he assisted in raising the timber boards.

Mr. *Cromwell* was again called : He denied the evidence of *Shillock*, as to his applying for a mates place : He was then engaged in a place : He said that he never saw the wreck, and knew of it from the information of others ; that when he saw her, she was in an awkward predicament.

Mr. *Charles Graves* was then examined as to Mr. *Cromwell's* character. He said he did believe from a knowledge of his character, that he would not swear to a lie ; that he thought he would rather cut off a joint of his finger than do so, and that he was always too high minded for a poor man.

Mr. *Toomer* said that he had known Captain *Cromwell* for many years ; knew his character and was sure that he could not tell a falsehood. In 1820, he was discharged from the service at his own request.

Captain *Lord* said he knew nothing against him, and would believe him on oath. Upon his cross examination, he said that he had heard that he was high tempered, but never that he was dishonest or unworthy of belief.

Verdict for the plaintiffs.

And a new trial was moved for, in which it was insisted :

1st. That the protest made by the captain in Charleston ought not to have been received in evidence, because a protest is an *ex parte* affidavit, in which the party whose rights or interest are to be affected by the evidence, have necessarily no opportunity to cross-examine ; and although this species of testimony has had the sanction of the judges formerly, yet it was then decided rather upon a usage that had obtained *sub silentio*, when the business of underwriting was new, and not fully understood.— That this species of testimony is repugnant to the principles of the common law, productive of great injustice, and is abolished in every Federal Court, and almost every State Court in the United States of America ; and is contrary to the English law, which, the policy in this case expressly refers to. That more particularly it ought not to be admitted where the case comes not in a foreign port but at home, and all the parties are on the spot.

2d. That the verdict in this case is contrary to law, for as much as the vessel sprung a destructive leak directly after her getting to sea, and without any stress of weather, and that the law of itself concludes it to be decisive evidence of the rotten or decayed state of the vessel, which can only be rebutted by strict proof being made of her soundness in the part where the mischief arose, and no proof was made on that point at all, as every witness confessed that he had never seen or examined that part of the ship. That general opinions of sea-worthiness, without such examination, are insufficient to repel the presumption of law ; and that his honor the judge ought to have instructed the jury to that effect.

3d. For that the verdict is contrary to the weight of

testimony, in as much as the plaintiff's witnesses could not, and did not testify to the sea-worthiness of the vessel's bottom (which they had never seen or examined) farther than to give their opinion or inferences from the state of her upper works. That their opinions not only were insufficient for the jury to go upon, but were strongly encountered by the opinions of other witnesses, by several facts as to the history and state of the vessel, and by positive testimony that the captain himself, whose protest was relied upon, did, while at sea, declare to the pilot who boarded her in her leaking state, that the ship was rotten.

4th. For that insufficient evidence was given of the value of the vessel. The documents that ought to have been produced in the case of an open policy being withheld by the plaintiffs, and the general opinion of a witness given, instead of the usual proof in such cases ; and that the value found by the jury was contrary to the evidence.

Mr. Justice *Colcock* delivered the opinion of the court :

On the first ground taken in this brief, it is only necessary to observe, that it has been the long established doctrine in this state, that the protest of the master and mariners should be received in evidence ; and this was solemnly determined by the unanimous opinion of the bench of judges in 1800, in the case of *Campbell vs. Williamson*, (2 Bay's Rep. 242.) It is not perceived how it can be said that the verdict of the jury is contrary to law, (as the second ground states,) for it is admitted on the ground itself that the legal presumption may be rebutted, and whether it was rebutted, is certainly a question of fact for the jury. They have a right to determine according to their view of the evidence, and consequently their verdict is a determination of fact, and not of law. The law was distinctly stated to them. That sea-worthiness was in the first instance to be presumed, but that if a ship within a day or two after her departure became leaky and foundered at sea, or should be obliged to put back, without any visible or adequate cause to produce such an effect, the natural

presumption must be that she was not sea-worthy when she sailed, and it will then be incumbent on the insured to *shew the state she was in at that time*. They were instructed that the whole doctrine was before them, and it was left to them to determine it. The proof was that she started a butt. Was this, in the language of the law, a visible and adequate cause for the leak, and such as would have happened to a vessel sea-worthy at the time of sailing? But it is incorrect to call this a legal presumption. *Marshall* and *Park* call it a natural presumption. As to the other grounds, they are predicated on the facts of the case.— There was a great deal of evidence on both sides, and it is therefore immaterial what the court may think of the verdict. They cannot say it was against or without evidence, nor that it is against law.

The motion is dismissed.

Justices *Gantt*, *Richardson*, *Johnson* and *Nott*, concurred.

Toomer, for the motion.

Prioleau, contra.

CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, MAY TERM, 1823.—COLUMBIA.

JUSTICES PRESENT THIS TERM.

ABRAHAM NOTT,

DAVID JOHNSON,

CHARLES J. COLCOCK,

JOHN S. RICHARDSON,

RICHARD GANTT,

DANIEL ELLIOTT HUGER.

CHARLES & ELIZA ELMS vs. Wm. CHEVIS.

A book account may be proved by proving the hand writing of the clerk, who made the entries, if he be out of the state.

THIS was a summary process on an open account for goods sold and delivered. The original entries were made by the plaintiff's clerk, who was absent from the state. It was proved that the entries were in the handwriting of the absent clerk, that he was the plaintiff's clerk, and that he was out of the state.

This evidence was deemed insufficient by the Circuit Court, and the plaintiff was refused a decree ; from which decision an appeal was now brought up.

Mr. Justice *Huger* delivered the opinion of the court :

The admission of such evidence has been, I think, too uniform and continued in this state, to be now disturbed. It is not in strict accordance with the rule which requires

the best evidence, but it is of a class of exceptions which mercantile convenience has sanctioned, and to which experience has furnished no objections.

The motion must therefore be granted.

Justices *Johnson* and *Colcock*, concurred.

Williams, for the motion.

Clinton, contra.

JOHN BUTLER vs. BENAJAH DENHAM.

The endorser of a note is discharged, if notice of non payment by the drawer is not given, or if a demand be not made on the drawer, although the note be drawn in the name of a firm which is dissolved.

Tried at Greenville, Spring Term, 1823.

THE action was assumpsit on five negotiable notes of hand brought by the plaintiff as endorsee against the defendant as endorser. The notes drawn in the spring and summer of 1821, by *John Davidson*, in the name of *Elijah Davidson & Co.* of which firm he said he was a partner, payable to the defendant, severally became due as follows, viz: 1st on the 24th May, 1821; 2nd on the 19th June, 1821; 3rd on the 30th June, 1821; 4th on the 19th August, 1821; and 5th on the 5th September, 1821. They were endorsed about the last of July or the first of August, 1821; three of them being then due and two not due. The plaintiff was then a workman in the defendants factory, at Greenville court house, where the notes were given; knew that they were given by *John Davidson*, with whom he was as well acquainted as the defendant was, and knew that he lived in Pendleton district and was a pedlar. The firm of *Elijah Davidson & Co.* was proved to have existed before the notes were drawn; that *John Davidson* was a partner, and that they had a

store in Pendleton district. The plaintiff never demanded payment of *Elijah Davidson & Co.* or of *John Davidson*; nor did he make any effort to present the notes for payment. About the 10th of February, 1822, his attorney, (not having the notes with him,) made some enquiry concerning the *Davidsons* at Pickensville, and was told they had failed. In the same month, however, another demand against the firm was secured, and their books of accounts were then at their store. In October, 1821, *John Davidson* passed through Pendleton with a drove of beef cattle for market, and then lived in Haywood, N. C. It was proved that about two years ago, there was a notice on the store door of *Elijah Davidson & Co.* signed by *Elijah Davidson*, that the partnership was dissolved, but there was no notice in the gazette, nor any proof that the defendant knew of it.

His honor charged the jury that the plaintiff had not used sufficient diligence to demand payment of any of the notes, and therefore could not recover, provided *Elijah Davidson & Co.* were really liable on the notes, but if the partnership were really dissolved, and the notice on the store door was evidence of that fact, then they were not liable to pay the notes, and the defendant was bound for them without either demand or notice. The jury found a verdict for the plaintiff. The defendant moved for a new trial on the grounds,

1st. That the firm of *Elijah Davidson & Co.* was liable to pay the notes, notice of a dissolution on the store not being sufficient, and his honor should have so charged the jury.

2nd. That the notes ought to have been presented to them for payment, whether the partnership was dissolved or not, and whether they were legally bound or not.

3rd. That in any view, *John Davidson* was liable, and a demand ought to have been made of him before recourse was had to the endorser.

Mr. Justice *Huger* delivered the opinion of the court:

In this case, it is unnecessary to enquire whether the copartnership of *Davidson & Co.* had been dissolved or not, *Davidson* himself drew the notes and was bound by them, whether the copartnership existed or not. They were given for valuable consideration, and the endorser has not been implicated directly or indirectly in the misconduct imputed to *Davidson*; as a *bona fide* payee he was entitled to all the rules which require a demand upon the drawer and notice to endorser. A new trial must then be granted.

Justices *Colcock*, *Nott* and *Richardson*, concurred.

Choice, for the motion.

Earle, contra.

JAMES CROCKER vs. JAS. HUNT.

The arms of a militia man are exempted from execution by law.

Spartanburgh, Spring Term, 1823.

THIS was an action brought against the defendant, who as sheriff, had levied upon the musket of the plaintiff, and sold it to satisfy an execution against the plaintiff. It appeared that the plaintiff was a private in a company of artillery, to which was attached no ordnance. The plaintiff was nonsuited on the ground that his arms were not exempted by the act of Congress, passed on the 8th May, 1792, providing for the national defence and establishing an uniform militia throughout the United States.

A motion was now made to set aside the nonsuit and reinstate the case on the docket.

Mr. Justice *Huger* delivered the opinion of the court:

By the congressional act of 1792, it is declared that every free able bodied white male citizen, between the ages

of eighteen and forty-five shall be enrolled in the militia, and that every citizen so enrolled, shall provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, and a pouch with a box therein ; and every citizen is required to appear so armed when called out to exercise or into service ; and the same clause further provides that any citizen so enrolled, providing himself with the arms and accoutrements required as aforesaid, shall hold the same exempted from all suits, distress, executions, or sales for debt or for the payment of taxes. The seventh section of the act declares that to every division of militia, there should be at least one company of artillery, each private of which shall furnish himself with all the equipments of a private in the infantry until proper ordnance and field artillery is provided.

The first recited clause requires every citizen enrolled to furnish himself with a musket, &c. and exempts such musket, &c. from suits, &c. The second recited clause impliedly exempts a private or matross of artillery from the necessity of furnishing himself with the equipments of a private of infantry, when proper ordnance and field artillery are provided : In this case, however, the plaintiff and his company, not having been furnished with ordnance and artillery, are required to equip themselves as infantry, and their equipments are protected by the act : Had the company been furnished with ordnance and artillery, I should even then doubt whether the plaintiff's equipments as a private of infantry, were not also exempted. The situation of the country, the improbability of artillery being ever used, the necessity of employing constantly the privates of artillery of militia as patrols, and on other duty requiring the equipments of the infantry, bring them within the policy and spirit of the first clause.

The motion is granted.

Justices *Colcock, Richardson, Gantt* and *Nott*, concurred.

Thompson, for the motion.

Roddy & Foster, contra.

ATHANATIUS THOMAS vs. CHESLEY DANIEL.

The land reserved to the Cherokees by the treaty of 1777, was not vacant within the meaning of the act of 1785, and therefore could not be granted. The Legislature of 1786 was supreme.

Trespass to try titles. Tried at Pendleton, October Term, 1822.

IN this case, the jury found the following special verdict, viz :

“The jury find that the Cherokee nation of Indians, by a treaty made with the State of South-Carolina, in the year of our Lord 1777, ceded to the said state all their lands to the eastward of the Unacaye mountain ; that the said State of South-Carolina, by the same treaty, agreed to permit the Cherokees, during their good behaviour, to inhabit the middle settlement and vallies westward of the highest point of Oconee Mountain. That the land claimed by the plaintiff in this action and described in his declaration, lies within the chartered limits of this state, within the territory ceded by the Cherokees to South-Carolina in the treaty of 1777, above referred to, westward of the highest point of Oconee Mountain, and within that portion of the territory ceded which South-Carolina had agreed to permit the Cherokees to inhabit during their good behaviour.

“The jury further find, that South-Carolina, by an act of Assembly, passed on the 21st day of March, 1784, entitled, “An Act for establishing the mode and conditions of surveying and granting the vacant lands within this state,” directed that all the lands lying and being to the northward of the ancient boundary line, heretofore established between the Cherokee nation of Indians and this state, running from Savannah river 50 degrees east, to Reedy river, and then due north, until it intersects the

North-Carolina boundary, shall be granted and sold on the terms, and under the several regulations therein mentioned. That the tract of land claimed by the plaintiff lies on the waters of Keowee river in the present district of Pendleton, to the northward of the ancient boundary line described in the said act of Assembly of March, 1784, and within the limits of the territory, by the said act, authorized to be granted and sold ; and that the tract claimed by the plaintiff was granted to him on the 1st day of August, 1785.

“ The jury further find that the Legislature of South-Carolina, by an act passed on the 22d day of March, 1786, entitled, “ an act reserving certain lands for the present use and occupation of the Indians, “ declared that all the lands lying and being within the chartered boundaries of this state to the north and north-west of a line running from the top of Oconee mountain north-west, till it intersects the river Toogaloo, should be reserved to the Cherokee nation of Indians for their present use and occupation, and declared all grants, sales or conveyances, which had before been or should thereafter be obtained within the chartered boundaries of the state to the north and north-west of the said boundary line, to be null and void, any law to the contrary notwithstanding,” and they find that the land claimed by the plaintiff is situated to the north-west of the said line.

“ The jury further find, that on the 22d day of March, 1816, a treaty was concluded in the city of Washington, with the consent of the general government, whereby the Cherokee nation of Indians did relinquish and cede to the State of South-Carolina their title to that part of their territory, lying within the chartered limits of the said State, which the jury find to be the same tract of country which was reserved for their temporary use and occupation by the above recited act of 1786. That by an act of the Legislature, passed on the 19th day of December, 1816, the said treaty was approved and confirmed, and the territory therein ceded was directed to be surveycd and laid off ip-

to tracts. That by another act, passed on the 17th day of December, 1817, the land was ordered and directed to be sold and granted: and the jury further find, that at the sale held by the commissioners for that purpose, the same tract of land granted to the plaintiff in 1785, as before recited, was purchased by the defendant: that he took possession in the course of the year 1818, and within five years before the issuing of the plaintiff's writ in this action, and that he has ever since continued to hold possession. But, whether upon the whole, the plaintiff is entitled to recover, the jury are ignorant, and pray the advisement of the court; and if the court shall be of opinion that the plaintiff is entitled to recover, then the jury find for the plaintiff, all the land contained in his grant, and included within the black lines on the plat of resurvey marked A. B. C. D. with five dollars damages.— But if the court shall be of opinion that the plaintiff is not entitled to recover, then the jury find for the defendant."

On the foregoing special verdict, the plaintiff's counsel now moved the Constitutional Court for leave to enter up judgment for the plaintiff.

Mr. Justice *Huger* delivered the opinion of the court:

If the land granted to the plaintiff was not vacant in 1785, (the date of his grant,) he is not entitled to his motion, for by the act of 1784, only vacant land was directed to be granted, and if the land was vacant, and the legislature of 1786 had the power to make void his grant, he must also fail; for by the act of 1786, his grant is declared null and void. I shall therefore enquire,

1st. Whether the land in question was vacant in 1785.

2d. Whether the Legislature of 1786 had the power to declare and make void the plaintiff's grant of 1785.

It appears from the first article of the treaty of 1777, with the Cherokee nation, that the district of country in which the plaintiff's grant was located, was ceded to the State of South-Carolina. By the 2d article, South-Carolina engages to permit the Cherokees to inhabit the said

district of country during good behaviour. Here are mutual engagements solemnly entered into between the contracting parties, and binding upon both, at least as binding as any contract can be upon sovereign powers.

But it is contended that although the Cherokees were permitted to inhabit this land during good behaviour, it was a tenancy at will, which the state at pleasure might defeat, and did defeat by the grant to the plaintiff under the act of 1784.

Without adverting to the inapplicability of the terms tenant and landlord, and the rules by which they are governed, to sovereign powers it is only necessary to observe, that no two estates can be more distinct than a tenancy at will, and an estate held during good behaviour, which at common law is an estate for life ; as the law cannot presume the extinction of a nation, an estate granted to one during good behaviour, must be an estate for ever. As long then as the Cherokees conformed to the conditions of the treaty, that is, "behaved themselves well," this State was morally bound to permit them to continue in undisturbed possession of the land in question. Had this state, however, with or without sufficient cause, declared the condition to be broken, on which they were permitted to hold the land, and that the same had become vacant, and should be granted out to individuals, the municipal courts must have been governed by such declaration, and the grant to the plaintiff must have been regarded as valid. But no such declaration has ever been made by this state ; she has, on the contrary, by all her acts, evinced the most perfect satisfaction with the conduct of that nation. From 1777 to 1816, their laws alone were of force in this reserved territory ; and when in 1816, this State wished to acquire full and complete sovereignty over this territory, she, under the auspices of the general government entered into a negotiation with the Indians for the relinquishments of those rights which were acknowledged to be in them, and for which, by treaty, she engaged to give, and did give an equivalent in money.

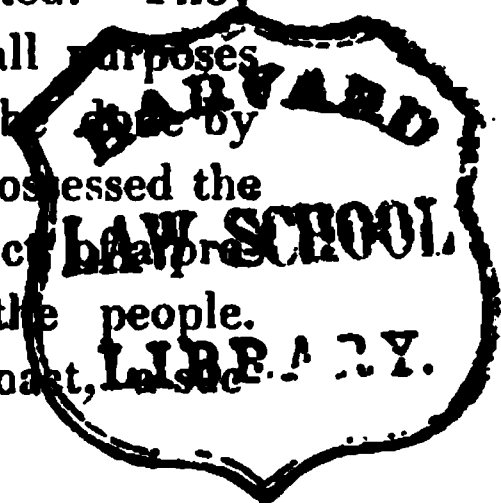
At no period has this state regarded it as consistent with her faith and character, to deprive these unoffending aborigines of the remnant of right secured to them by the treaty of 1777, unless indeed, she did so by the act of 1784, as is not contended by the plaintiff. So much at variance would it have been with the character she has always preserved, and which I trust she ever will preserve, that I should feel unauthorized to conclude she had done so, but on the strongest evidence. It is not sufficient to authorize such a conclusion, that an act of the legislature might be so construed; nothing less than the most plain and unequivocal language could force me to such a conclusion. What, however, is the language of the act of 1784? It is entitled, "an act for establishing the mode and conditions of surveying and granting the *vacant* lands within this state;" its object is general, it refers to every part of the state, and only vacant land is to be surveyed and granted. Land appropriated by the legislature is not vacant, be that appropriation what it may; to individuals, to public purposes, or to the Cherokees. In one of the enacting clauses, it is declared "that all the lands lying and being to the northwest of the ancient boundary line, between the Cherokee Nation of Indians and this State, running from Savannah river, 50 degrees east to Reedy river, and then due north, until it intersects the No. Carolina line, shall be granted and sold," &c. This clause when read in connexion with the preamble and qualified by it, obviously means that all the *vacant* land above the old Indian boundary line, shall be surveyed and granted. Had the reserve consisted of all the land beyond this line, the intention of the legislature would have been manifest, but as the vacant land above the line, not reserved, consisted of the districts of Pendleton and Greenville, as they stood before the treaty of 1816, making nearly one eighth of the state, and the reserve of not more than a fiftieth part of that quantity, it is unnecessary to give meaning to the clause to include the reserve within its provisions. To include the reserve, would be to attribute to the legislature of 1784, a

deliberate intention of violating the faith of the state, without a possible motive; for at that time they could not have anticipated the advance of our population to it in much less than a century; for it is only now that our population, which has increased in an unprecedented ratio, is approximating to it. But such was not the intention of the legislature. Only so much of the territory ceded by the Indians was vacant, as was not reserved to them by the treaty of 1777, and for only so much, were the executive officers of the state authorized to issue grants by the act of 1784.

That such was the intention of the legislature, appears not only from a fair construction of the act of 1784, but from their subsequent act passed in 1786, which is substantially declaratory of that act. The act of 1786, not only confirms to the Cherokees the reserve secured to them by the treaty of 1777, but declares null and void all grants which may have been procured for any part thereof. Whether the officers of the state issued the grant by mistake or were deceived by the grantee, is not material in either case; it was void, having been issued without authority, the land not being vacant within the meaning of the act of 1784.

Had, however, the act of 1784, authorized the issuing of this grant, the legislature of 1786 declared it null and void. This brings me to the consideration of the second question.

Between the declaration of our National Independence and the adoption of the Federal Constitution, this state was sovereign and uncontrolled. The people, in whom all power was vested, thought proper to employ the legislature as their agents, in the exercise of that power. In the use of this power, the legislature was unlimited. They were the representatives of the people; for all purposes whatever could be done by the people, could be done by the legislature. Each succeeding legislature possessed the same power, and could not be bound by any act of a preceding legislature, for each legislature was the people. Whatever, therefore, one legislature could enact, the



ceeding legislature could repeal. The form of government adopted by the legislature of 1776, was no more than any other legislative act, and was subject to the revision and repeal of a succeeding legislature. The legislature of 1778, did revise and repeal the act of 1776, and adopted another form of government, which is called the constitution of 1778. This constitution pretends to no control over succeeding legislatures, although it does restrain the officers of government in the exercise of the powers vested in them for the administration of the laws. Had it attempted to restrain future legislatures, it would have been inoperative; as each legislature possessed all the power of the people, who can undo whatever they may have done.

The people, or their representatives, the legislature, when unlimited by the people, may do whatever is physically possible, although they ought not as moral agents to do what is morally wrong. Should they, however, do what is morally wrong, being supreme, they could not be restrained. Were the judicial tribunals, (which are limited in their power, and only appointed to administer the laws enacted by the people,) to declare an act void because immoral, the power of the people would be usurped, and the judicial power would become so far supreme. However painful it might be to those who preside in these tribunals to enforce laws repugnant to the moral sense, they must conform as long as they continue Judges, to the duties of their station. An unlimited legislature is despotic in its power, and it was to prevent the probable abuse of such power, that the people of this country adopted their constitution; in which the legislature as well as every other agent of the people, are required to confine themselves within certain specified boundaries. Whenever they travel beyond their prescribed limits, it is made the duty of the judges to restrain them; for the constitution is the permanent law. In 1786, however, we had no such constitution, and the Legislature was at liberty to repeal the act of 1784, and to declare as null and void, eve-

by act done in conformity to it. If such declaration defeated a contract which the state had fairly made with the plaintiff, it was morally wrong ; but this court has not the power to annul it. But was it wrong in the State to annul a contract with the plaintiff, which was itself a violation of a preceding contract with the Cherokees ? Assuredly not. Where consecutive wrongs are to be expiated, it is usually right, and not morally wrong. To begin with the first, I must therefore conclude that the grant to the plaintiff was issued through mistake, and that the Legislature of '86 had the power to annul, and did annul the grant in question. It has been said, however, at the bar, that the proceeding in such a case should be by *scire facias*. That it is so in England, may be admitted. The parliament of that country consisting of King, Lords and Commons, has the power to prescribe the mode in which such a proceeding should be conducted in England, and by which tribunal it should be decided. Had it however been their pleasure, they might have retained it themselves, as did the Legislature of this State in 1786. It was certainly not incumbent upon the people of this State to adopt the mode which had been thought best in England. The Legislature of '85 had jurisdiction of the case, if they thought proper to sustain it. They did sustain it, and their decision is as conclusive in this court as would have been the decision of any other court having competent jurisdiction. On both grounds, I am with the defendant.

The motion of the plaintiff must therefore fail, and judgment be awarded to the defendant.

Justices *Gantt*, *Nott* and *Johnson*, concurred.

Earle & Harrison, for the motion.

Davis, contra.

ELIZA SMITH, by her friend, *vs.* **JOHN LITTLEJOHN**.

A father is a competent witness to prove a gift by himself to his child. A *bona fide* gift, though voluntary, is not fraudulent against a subsequent creditor.

TROVER for a negro girl *Lucy*.

The plaintiff, a minor, claimed the girl in question under a parol gift made to her by her father *John Smith*, eleven years anterior to the commencement of this action.

The defendant held under a bill of sale from the sheriff who sold by virtue of an execution, in the case of *Dawkins & Littlejohn vs. John Smith*, in which case judgment was entered up on the 30th of May, 1820.

John Smith and his wife, (the father and mother of the plaintiff,) were received as competent witnesses to prove the gift which was made to the plaintiff when *Lucy* was an infant in arms, on the suggestion of the nurse. At the time of the gift, *John Smith*, the donor, was not in debt except to a very small amount, (a few pounds,) when he contracted the debt with *Dawkins & Littlejohn*. *Smith* stated that *Dawkins* was informed of the parol gift made to the plaintiff. This, however was denied by *Dawkins*.

It appeared very satisfactorily that the gift had been made without any intention or motive to commit a fraud. Several of *Smith's* neighbours were examined as to the notoriety of the gift. Some had heard of it, and others not.

It appeared further, that when *Dawkins* had required a mortgage of property from *Smith*, to secure some debt which had accrued subsequent to the gift, but prior to the judgment, he was told that the negro girl *Lucy* could not be included with her family in the mortgage as she was the property of the plaintiff. This mortgage was afterwards satisfied.

It further appeared that the defendant had notice of the gift prior to his purchase. The judge in his charge di-

rected the jury to find for the plaintiff, should they be satisfied that the parol gift had been made *bona fide*, and prior to the debt, and that *Dawkins* had notice of it prior to the credit given to *J. Smith*. He further stated, that as the plaintiff was an infant, residing with her parent, the possession of the negro by the father was not inconsistent with her claim, and that being an infant, she was not required to give notice herself to the defendant.

A verdict was rendered for the plaintiff.

A motion was now made for a new trial on the following grounds:

1st. Because, under the circumstances of the case, *Smith* and his wife were incompetent witnesses.

2d. Because the judge erred in stating that a voluntary gift is good against a subsequent purchaser for valuable consideration.

Mr. Justice *Huger* delivered the opinion of the court:

The circumstances under which *Smith* and his wife stood to the plaintiff were very well calculated to affect their credibility; but nothing has appeared which could destroy their competency. They had no direct interest in the event of the suit, and the judgment to be rendered could not be evidence in any case in which thereafter they might be parties; although the policy of the law has excluded other witnesses, as a negro, one convicted of an infamous crime, a wife for or against her husband and others, yet it is not to be understood that the court is at liberty to exclude one, because, from the peculiar circumstances of the case, it may be thought impolitic to admit him. To be excluded, he must be brought under some exception already established and defined. To do more, would be to legislate. It is much safer to weigh these circumstances, when estimating the credibility of a witness than to apply so loose a rule to his competency. On the first ground, therefore, the motion must fail.

The second ground assumes a fact which is contradicted by the testimony. The contest was not between a ve-

luntary donor and subsequent purchaser, but between the donor and the subsequent creditor. The defendant holds not as a purchaser from *Smith*, but as one of the creditors of *Smith*, or under a sale by one of the creditors of *Smith*.

The Statute of 13 *Elizabeth*, does not make void all gifts, &c. which are voluntary, but only such as are fraudulent; and it has never been denied, that where gifts, &c. are fair, (though voluntary,) they ought to be supported. Lord *Munsfield*, (*Cowp.* 436,) decided that a settlement was not fraudulent, because there were creditors at the time it was made, if the transaction was a fair one. And in *Cowp.* 710–11, he ruled that if the circumstances of the transaction shew that it was not fraudulent at the time, it is not within the statute, though no money was paid.

In this case, it was left to the jury to decide from the circumstances of the case, whether the gift was fraudulent or not. They have decided it was *not* fraudulent, with which decision I am perfectly satisfied.

The motion, therefore, must be dismissed.

Justices *Johnson*, *Nott* and *Richardson*, concurred.

Farnandis, for the motion.

Williams, contra.

MATTHEW BROOKS *ads.* CHARLES FLOYD.

An executor may sue in his own name, or as executor, upon a note made payable to a third person or *bearer*, and transferred to his testator *before* his death.

Tried at Newberry, Spring Term, 1823.

THE note on which this action was brought was made by the defendant, and payable to *Thomas Waters*, or bearer.

It was transferred by him to *William Owens*, now deceased, by delivery, and it came into the hands of the present plaintiff as one of his executors.

The action was in the individual name of the plaintiff, and not in his representative character as executor of *Owens*: And upon these facts appearing on the trial, a motion was made for a non-suit, on the ground that the plaintiff was not entitled to sue in his own name, in as much as he held the note as executor of *Owens*, and ought to have sued in that character.

The presiding judge overruled the motion, and it was now renewed in this court on the same ground.

Mr. Justice *Johnson* delivered the opinion of the court:

It is in general true, that with respect to wrongs done to the testator, or rights withheld from him, the executor cannot maintain an action in his own name, but must sue in his representative character; but with respect to those which grow out of his administration of the estate, he may maintain an action in his own name. Thus he may maintain trover in his own name, for the conversion of the goods of the testator in his own time. So by the terms of the contract made, with respect to the estate, he may assume his personal character, and give himself a personal remedy.

The question in this case, however, turns more directly on rules applicable to the peculiar character of the legal obligation imposed by the note on which this action is brought.

It is not doubted that the property in, as well as all the rights incident to a note, payable to bearer, is transferable by delivery, and amongst these, the right to sue is the most indisputable; and whether we regard the natural import of the term itself, or its legal consequences, the same result follows. It is in direct terms, a promise to pay to the bearer, and when once it passes out of the hands of the original payee, it enters into the circulating medium of the country, becomes identified with it as a repre-

sentative of coin, and like it is the property of him who has the legal possession; and as an incident, the right to sue is indispensable.

The correctness of this conclusion is clearly deducible from the manner of declaring, and the proof necessary to support an action on such a contract. The plaintiff need not state in his declaration, nor is it incumbent on him to prove any consideration for the transfer. The possession of the note is *prima facie* evidence of his right to recover. (*Burrows*, 1516.) Such proof only becomes necessary in reply to proof, raising a suspicion that the plaintiff had come to the possession by improper means, as where it had been lost by a prior holder, &c.; and even then he would be entitled to recover on proof that he paid value for it. (*Chitty on Bills*, 62-3-4-269, 250.)

According to this rule, to drive the plaintiff to the proof of a consideration given for the note, it was incumbent on the defendant to throw some suspicion on his manner of obtaining the possession; and so far from it, the proof in this case shows that his possession was rightful.

It is not denied that the plaintiff might, if he had thought proper, have sued in the character of executor, but he had a right as in very many other cases, to elect in what character he would sue. In this case he has made that election, and is entitled to recover.

It is said, however, that the assumption of this character would preclude a defence which the defendant might have had if he had sued in his representative character.— But I am inclined to think this would not follow, as the bearer deriving his interest through his testator, he would be presumed to be conversant with every thing which affected his interest, and consequently would be presumed to be the bearer, with notice of whatever went to its destruction in the hands of his testator.

The motion is refused.

Justices *Nott*, *Gantt*, *Richardson* and *Huger*, concurred.

Colcock, Justice: I dissent as to this case, the plaintiff holding as executor.

O'Neal & Johnson, for the motion.

Bauskett & Dunlap, contra.

SAM. NOYES vs. WM. HAYNESWORTH.

Clerks of Courts and Justices of the Quorum, (as commissioners of special bail,) have jurisdiction to carry into execution the "prison bounds act."

Tried at Sumter, March, 1823.

THE plaintiff was confined in the custody of the sheriff of Sumter district on civil process, and applied to the defendant, who was one of the justices of the quorum for that district, to be discharged under the prison bounds act. The defendant conceiving that he was not authorized to take cognizance of the case, rejected the application; and this was an application to the court for the writ of mandamus to compel him to proceed thereon. The court refused the writ, and this was an appeal from that decision, involving the question whether clerks of the courts and justices of the quorum have, or have not, the power to carry the act into execution.

Mr. Justice *Johnson* delivered the opinion of the court:

By the act of 1769, (*Pub. Laws*, 273,) the Judges are required to "appoint fit and proper commissioners in each district, who shall have power to take recognizances of special bail, &c." and the prison bounds act of 1789, indirectly referring to the persons so to be appointed, give them in express terms, the power of carrying it into effect, under the appellation of "commissioners of special bail."

By the act of 1799, (2 *Faust*, 314,) the clerks of the courts and justices of the quorum are authorized "to take recognizances of special bail, &c."

It is obvious that the appellation of "commissioners of special bail," as used in the prison bounds act, was given in respect to the powers conferred on the persons to be appointed by the Judges, under the act of 1769. And if it be applied, (and I see no reason why it may not,) to the persons now exercising that power, the authority of the clerks and the justices of quorum to carry the act into effect, is apparent. The whole difficulty in the case appears to me to have originated in confounding terms. The clerk, for instance, is not the less a commissioner of special bail because he is also clerk, for when called on to act in that character, the clerk is lost in the commissioner.

Admitting, however, that doubts may exist with regard to the correctness of this conclusion, we have in the usage under the act of '99, conclusive evidence of the interpretation it then received. It is a well known fact, that this power has been universally exercised by the clerks and justices of the quorum, and no appointment of commissioners of special bail has ever been made since that period under the authority of the act of 1769 ; and although a usage of this standing would not justify a procedure in direct opposition to the obvious meaning of a positive enactment ; yet when we recollect that the evil to be remedied, and the remedy provided, are better understood at the time, we have in its immediate application the best guide to its correct interpretation.

The motion is therefore granted, and it is accordingly ordered that the writ of mandamus do issue.

Justices *Nott*, *Gantt*, *Huger* and *Richardson*, concurred.

Holmes, for the motion

Haynesworth, contra,

JAMES WILLARD vs. JOSEPH REEDER.

Where a person borrowed money and gave his note for the amount, with lawful interest, and at the same time made a verbal promise to pay 5 per cent. more interest, making 12 per cent. the court *Held*, upon an action being brought on the note, that it was usurious and void ; although it was left to the borrowers honor only, whether he would pay more than legal interest.

Tried at Union, Spring Term, 1823.

ASSUMPSIT on a promissory note—Defence that the contract on which it was founded was usurious.

The plaintiff was called under the act to testify as to the usury. He stated that the defendant applied to him to borrow money, and proposed of himself to give at the rate of 12 1-2 per cent. per annum interest. That he lent him the sum wanted, \$ 300, and took his note for the amount, with the lawful interest ; and it was agreed to be left to the defendant's honor whether he would pay the excess or not. Upon being interrogated as to the fact, the plaintiff admitted that he would not have lent the money if the defendant had not promised to give the twelve and a half per cent.

The jury found for the defendant under the direction of the court ; and this was a motion for a new trial, on the ground, that as the contract to pay the usury was merely honorary, it imposed no legal obligation, and was not therefore usurious.

Mr. Justice *Johnson* delivered the opinion of the court :

All the difficulties which the arguments in support of this motion have presented, appear to me to have originated in confounding the contract itself with the evidences of it ; or rather in supposing that the note itself was the only evidence of what was intended.

It is generally true, that when a contract is reduced to writing, that constitutes the only evidence of it. Yet, it

is equally true, that if there be no consideration, (especially in contracts not under seal,) or if the consideration fail, or it be obtained by fraud, or is against law, the defendant may avail himself of it; and most usually, parol proof is the only evidence of which the thing is susceptible. And this holds good with respect to promissory notes for another reason, when the consideration is not expressed, but is supplied by the words, "value received," leaving it uncertain what it was, and can only be explained by parol proof. Numerous instances of this daily occur in our courts.

When we examine the consideration of this note with the light which the parol evidence sheds upon it, the corrupt agreement is apparent. There was a promise to give, and a consent to accept, more than lawful interest, and this, according to the plaintiff's own evidence, was the *sine qua non* of the contract.

But it is said this promise did not constitute an agreement, because it was merely honorary, and imposed no obligation on the defendant. This course of reasoning would lead to the ridiculous result, that a party could not incur the forfeitures and penalties attached to usury, because the act by which it was consummated imposed no obligation. Agreements against law have the form, but not the binding efficacy of contracts; consequently, all the obligation they impose, must, of necessity, be only honorary.

The evidence leaves no doubt about the fact, that the promise to pay the twelve and a half per cent. by whatever term its character may be distinguished, entered into the consideration of the loan, and contaminates the whole.

The motion is refused.

Justices *Colcock, Nott, Gantt, Richardson* and *Huger*, concurred.

Williams, for the motion.

Johnson, contra.

WILLIAM BARMORE vs. JOHN JAY.

To make out a title under sheriff's sale, extrinsic evidence is admissible to show that an execution was lodged, and that the land was sold under it, and the deed made on different days from those stated in the entry and return endorsed.

An objection to the regularity of a resurvey, (in an action to try titles,) according to the rules of court, must be made before the cause has gone to the jury.

Tried at Abbeville, Spring Term, 1823.

Trespass to try titles to land.

THE plaintiff in deducing his title, gave in evidence a deed made by *John N. Newby*, late sheriff of Abbeville, to himself, which purported to have been made in pursuance of a sale under execution against the present defendant, at the suit of *Wm. Owens*. The judgment on which this execution was founded, appeared to have been signed on the 12th August, 1819, and the memorandum endorsed on the execution, as to the time it was lodged in the sheriff's office, bore date the 11th August, one day before the judgment.

The deed was dated the 6th January, 1820.

The execution was levied on the land in dispute, the 19th August, 1819, and the following return was endorsed: "sold the land to *Wm. Barmore*, 6th March, 1820. Fifty dollars made. (Signed *John N. Newby*.)" So that by comparing dates, it would appear that the deed was made two months before the sale.

The court permitted the plaintiff to prove by parol, that the execution was not lodged in the sheriff's office until after the signing of the judgment; although from the entry endorsed, it appeared to have been done before; and the deed was not made until after a sale had been actually made, which the witness thought was on the sale day in January, 1820, (the date of the deed,) instead of the 6th of March, as the return purports.

In closing the plaintiff's evidence, a resurvey made under an order of court, was offered to prove the *locus in quo*. This was objected to on the ground that the defend-

ant had no notice of the time of making it. The objection was overruled as coming too late after the case had gone to the jury.

A verdict was found for the plaintiff, and the defendant moved for a new trial on the following grounds :

1st. That parol evidence was improperly admitted to show that the execution was lodged, and that the land was sold, and the deed made on different days from those stated in the entry and return endorsed.

2nd. That the survey ought not to have been given in evidence, as the defendant had not notice of the time of making it.

Mr. Justice *Johnson* delivered the opinion of the court:

The first ground of this motion is advocated on the broad and well established principle that parol evidence is inadmissible to add to, vary or contradict a written instrument. But when associated with the reasons on which it is founded, it is apparent that it only applies to the essential and substantial parts of the writing, and not to those that are merely formal. Thus, in *Goddard's* case, (2 Rep. 46. *Phillips* 428,) it was held that the delivery of a deed may be shown by parol on a day different from that on which it bears date ; from which time alone, it can take effect. On this principle alone, in the case of *Jackson, ex dem. vs. Schoomaker*, (2 *Johnson's Rep.* 230,) the court admitted parol evidence to shew that a deed bearing date in 1714, was not executed until 1717, and chief justice *Kent* remarks that the date is no part of the substance of the deed, and not necessary to be inserted. The real date is the time of delivery.

If this principle is to be regarded as operating on the date of the return, or the date of the deed, the same result will follow ; for the witness stated with certainty, that the deed was not executed until after the land was sold. If on the former, it is made to correspond with the date of the deed. But if the date of the return is incontrovertible, it must control that of the deed which can take effect

only from that time, and in either case the plaintiff is entitled to recover.

The same rule applies with regard to the signing of the judgment, and the lodgment of the execution. This was evidently a mere clerical mistake. The execution was not acted on for several days after, and there was no motive for lodging it before the judgment was signed.

The rule of court is conclusive on the second ground. An objection to the regularity of a resurvey must be made before the cause has gone to the jury.

The motion is refused.

Justices *Colcock*, *Nott*, *Richardson* and *Huger*, concurred.

Justice *Gantt* dissented.

Glascock, for the motion.

Noble, contra.

EDMUND WARE vs. ROBERT KEY.

An assignment of a *chose in action* not negotiable, has always been considered by our court as a letter of attorney to the assignee; the assignee, or holder of one that is negotiable, may therefore elect to regard himself in that character or sue in his own name.

Tried at Abbeville, Spring, 1823.

THE note on which this action was founded, was drawn by the defendant and payable to the plaintiff, or bearer.

It appeared from the evidence that the plaintiff had passed the note by delivery, to *Wm. Powell* for a valuable consideration. The action was brought by the executors of *Powell*, who died before the commencement of this action, who were now prosecuting it. This being brought

in the name of the plaintiff, was evidently the result of some mistake or inadvertence. It was well known to the plaintiff that this action was carried on in his name, and he never interposed any objection to it.

When the evidence on the part of the plaintiff was closed, the defendant moved for a non suit on the ground that the action would not lie in the name of the plaintiff, as he had passed the note in the manner above mentioned.

The presiding Judge was of opinion that the action might be maintained in the name of the plaintiff with his consent, and that this might be presumed from his knowledge of, and acquiescence in the proceeding. But that the plaintiff, (who was then present,) might, if he thought proper, suffer a nonsuit. He declined doing so, and the motion was refused.

A verdict was found for the plaintiff, and the motion for a non suit was renewed in this court on the same ground.

Mr. Justice *Johnson* delivered the opinion of the court :

The general rule is that an action can only be maintained in the name of him in whom, by the terms of the contract, the legal interest is vested, (1 *East*. 497. 2 *Term* 711.) Upon this principle, choses in action not being assignable at common law, actions on them could only be maintained in the name of the original parties, (1 *Chitty on Pleading*, 10-11,) notwithstanding the actual interest had been passed by assignment, delivery, &c. And it is only under the several legislative provisions on this subject, that the assignees and holders of choses in action, are permitted to bring actions in their own names, and none of these contain any provisions which take away the right to proceed according to the rule of the common law.

Our courts have always regarded the assignment of a chose in action, not negotiable as a letter of attorney to the assignee. The assignee or holder of one that is negotiable, may therefore elect to regard himself in that character or sue in his own name under the authority of the statutes and acts authorizing it.

Superadded to this motion, was one for a new trial, on the ground that the defendant proved the payment. This ground is clearly without support, as the preponderance of the testimony was against it.

The motion is refused.

Justices *Colcock, Nott, Gantt, Richardson* and *Huger*, concurred.

Noble & Wardlaw, for the motion.

Downs, contra.

HUGH MCCALL vs. RICHARD SMITH.

A. sold a negro to B. and took his note with C. as security for a part of the purchase money. Judgment was obtained on the note, but it was not satisfied; the court *Held* that in an action by B. against A. for a fraud in the sale of the negro, C. was an incompetent witness.

Tried at Richland, Spring Term, 1823.

THE defendant had sold a negro to the plaintiff, and took his note with *Joseph May*, as security for a part of the price. He had brought several suits against them on this note, and obtained judgments, which were not yet satisfied. This was an action to recover damages for a fraud in the sale of the negro, and to prove it the plaintiff offered in evidence the examination of *May*, taken by commission. The presiding judge was of opinion that *May's* interest in the event of the suit rendered him incompetent. The plaintiff then moved to continue the cause with a view to render *May* competent by payment of the judgment on the notes, and to obtain the opportunity of examining him *de novo*.

The application was refused by the court, and the plaintiff being unable to prove his case, was non-suited.

This was a motion to set aside the non-suit, on the ground :

1st. That *May* was a competent witness.

2nd. Because the causes shown gave the plaintiff a right to a continuance.

Mr. Justice *Johnson* delivered the opinion of the court :

It is not necessary to render a witness incompetent that he should have a direct and immediate interest in the event of the suit. If he is to derive any advantage from it, it is enough. Although it be consequential only, he cannot be sworn. (2 *Bacon's Abr.* 384, *Tit. Evidence (B.)*)

The application of this rule to the present case, is obvious. *May*, the witness, is not directly interested ; but if the plaintiff in this case recovers, he may immediately set off this judgment against that recovered against him by the defendant ; and the judgment against *May* being for the same cause of action, it will operate as a satisfaction of that also ; so that the payment of the judgment against him is the necessary consequence of the plaintiff's recovering in this case, and renders him incompetent.

Applications for continuances are always addressed to the discretion of the court, about which, it is impossible to lay down any rule which can or ought to control it.

We know from daily experience that parties resort to the most wiley artifices, supported by the most abominable perjury for the purposes of delay and oppression ; and there is none so competent to judge of the merits or demerits of such application as the judge, before whom these things transpired. He ought not therefore to be controlled in the exercise of a sound discretion, and in my judgment this court ought never to interfere, except as a mere instrument in the hands of the presiding judge to aid him

in revising his own judgment, or to correct his own inadvertance.

The motion is refused.

Justices *Nott*, *Richardson* and *Huger*, concurred.

Justices *Colcock* and *Gantt*, dissented.

De Saussure, for the motion.

Gregg, contra.

THE STATE vs. JOHN HALDER.

An indictment for passing counterfeit money, charged that the defendant "feloniously utter and publish, dispose and pass, &c. &c." omitting the word *did*, before *utter*, &c.; the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner *did* the act.

Tried at Spartanburg, Spring Term, 1823.

THE prisoner was tried and convicted on an indictment for a forgery ; and a motion was now made to arrest the judgment, on the ground that the indictment did not charge that the prisoner *did* the act.

The indictment charged that the prisoner " on the 6th day of August, 1822, at Spartanburg Court-house, in the district and state aforesaid, feloniously," (omitting the word *did*) " utter and publish, dispose of, pass, and put away, as true to one *William Hunt*, a certain false forged and counterfeited bank note for the payment of money, purporting to be of the Incorporated Bank of the State of South-Carolina, the tenor of which is as follows, &c." and concluded with averring, that the prisoner at the " time of uttering, &c. well knew that the said note was false, forged, and counterfeit, &c."

Mr. Justice *Johnson* delivered the opinion of the court :

In the developement of the general rule, that certainly is necessary in an indictment, it is laid down that it must be certain to every intent, and without any intendment to the contrary ; (1 *Chitty*, C. L. 141, 172,) and that the offence must be positively charged, and not by way of recital. (2 *Strange*, 900. 2 *Lord Raymond*, 1363.)

The reasons upon which these rules are founded, are manifest. They are necessary to enable the accused to prepare to repel or rebut the charge, to protect him from a future prosecution for the same offence, and to enable the court to pronounce its judgment.

Look into this indictment, and let it be asked, with what criminal act does it charge the prisoner ?

It is answered in the argument, that by looking into the whole context, and taking into view the concluding averment, “that at the time of the uttering, &c. the prisoner well knew, &c.” what was intended, sufficiently appears to answer all the purposes for which certainty is required. The averment refers to the preceding, and you must look to that to determine its meaning, and you are left to conjecture what is intended. If you state to a special pleader that the prisoner is indicted for passing a counterfeit bank note, his learning will readily supply all the averments as to time, place and manner, necessary to a perfect indictment ; and according to this course of reasoning, no formal indictment is necessary. But the ignorant as well as the learned are sometimes, and indeed more frequently the subjects of criminal prosecutions ; and it is as important that they should be apprised of the charge against them. Nothing ought therefore to be left to conjecture. It might be conjectured from what appears in this indictment, that the charge intended was, that the prisoner was present when another did the act.— That he heard that he *did*. That the prisoner *did* not do the act ; and fancy might conjecture a thousand other things equally appropriate and innocent in themselves.

The omission of the positive averment that the prison-

er did the act, is not supplied by the concluding averment in the indictment, and is fatal.

The motion is granted.

Justices *Colcock, Nott, Gantt, Richardson & Huger*, concurred.

Thompson, for the motion.

Earle, Sol. contra.

CHARLES IRBY vs. JOHN W. VINING.

It is sufficient notice of the dissolution of a copartnership, if such circumstances be proved, as leave no rational doubt that the party knew of the dissolution.

Marlborough district, October Term, 1822.

Tried before Mr. Justice *Gantt*.

THIS was an action brought on a note of hand, signed *Vining & Wilson*, and dated 3rd April, 1820. The note was subscribed in the hand writing of *Wilson*, and it was admitted that the defendant and *Wilson* had been merchants trading under the firm of *Vining & Wilson*, and that the plaintiff had been one of their customers.

G. B. Whitfield and *R. Carloss* were examined by the defendant, and stated that in the months of April and May, 1818, *Charles T. Stewart, Vining*, the defendant, and *Wilson*, entered into copartnership under the firm of *Stewart, Wilson & Co.* at the same place. That they had no knowledge of any separate firm afterwards existing under the firm of *Vining & Wilson*. The defendant then offered to prove that the plaintiff was a customer of *Stewart, Wilson & Co's.* was frequently at their store, lived in the same neighborhood, and that an advertisement was posted up at the house lately occupied by *Vining & Wilson*, and then by *Stewart, Wilson &*

Co. stating that the copartnership of *Vining & Wilson* had dissolved. The presiding Judge held that nothing less than personal notice to the plaintiff of the dissolution of the copartnership of *Vining & Wilson*, would be sufficient to discharge the defendant from his liability, and rejected the testimony, and decreed for the plaintiff. A new trial was moved for on the ground that the presiding Judge misstated the law in determining that nothing less than actual and personal notice was sufficient.

Mr. Justice *Colcock* delivered the opinion of the court :

In the case of *Jacob Martin vs. Wm. Walton & Co.* (1 *McCords Rep.* 16,) and the case of the *Bank of So. Carolina vs. Humphreys & Matheus*, (*Ibid*, 388,) the court have determined that that which is tantamount to a personal notice, shall be sufficient. If such circumstances are proved as leave no rational doubt on the mind that one knew of the dissolution of the copartnership ; this is certainly as satisfactory as direct and positive proof. It is in fact, all that is meant by the rule ; for where a copartnership had existed for a long time, and an extensive business carried on, it would be difficult if not impossible to send to each customer direct and personal notice. The evidence, therefore, should have been received, and if it had not been satisfactory, the decree would have remained.

The motion is granted.

Justices *Johnson*, *Huger*, *Richardson* and *Nott*, concurred.

Campbell, for the motion.

Ervin, contra.

JAMES PARKS vs. H. DUKE.

An indorser of a sealed note is not liable as an indorser, and where he suffered judgment to go against him, he was not allowed to recover the costs so incurred from the drawer.

Laurens district, Spring Term, 1822.

THIS was an action by the plaintiff to recover from the defendant, the amount of costs paid by him in consequence of his assignment of a note made by the defendant to him, on which assignment he had been sued by *Wm Cobb*, to whom it was passed, and had suffered judgment to go against him by default. The note was in the following words :

“ On the first day of January next, I promise to pay to *James Parks, sen.* or order, one hundred dollars, for value received. Witness my hand and seal, this 19th March, 1819. Signed, *Hardimon Duke.*” Witness, *John Garlington.* Endorsed in the following words. “ I endorse the within note for value received, to *Wm. Cobb*, July 2, 1819. JAMES PARKS, JR.”

Test, *Samuel Irby.*

On the trial below, the presiding Judge decreed for the plaintiff, and a motion was now made to reverse that decree, because the plaintiff, *Parks*, was not liable to an action on the note as endorser, and should have defended himself against the action.

Mr. Justice *Colcock* delivered the opinion of the court :
 This is certainly not a negotiable note. It is under seal. The scrawl must be considered as a seal, because it is clear the parties so considered it. The attestation of the maker says under my hand and seal. The plaintiff was not then liable to be sued as indorser, and might have defended himself against the suit and non suited the holder. It was then his own fault that he has been subjected to costs, and consequently he has no right to recover them back from the defendant.

The motion is granted.

Justices *Johnson, Huger, Gantt* and *Nott*, concurred.

Porter, for the motion.

O'Neal & Irby, contra.

YATES, Adm'r. of PHILIPS, vs. JOHN P. BOND.

There is no implied warranty at Sheriff's sales. The rule of *Caveat Emptor* applies.

Assumpsit.—Tried before Mr. Justice *Johnson*, at Lexington, October Term, 1822.

THIS was an action of assumpsit on a note of hand.

All the facts of the case were admitted, which will appear from the following statement: It appeared that the tract of land for which the note was given, was once the subject of dispute in the Court of Common Pleas, between *George Patterson*, the plaintiff's intestate, and the defendant, and that *Patterson* had recovered a verdict for it.—It further appeared, that the land was levied on by the sheriff under an execution, and for the purpose of making an advantageous sale, it was sold on twelve months credit by the direction of an agent, Mr. *Stark*, and the defendant bid it off, and gave his note for the purchase money. Upon a re-survey of the land, after the purchase, the defendant found a considerable part of it was held in possession, and claimed by another person; of this he was prepared to give evidence on the trial; but his honor who tried the case entertained some doubts as to the propriety of the evidence, and finally overruled it. The defendant now moved the court for a new trial, on the ground, that a recovery by the plaintiff's intestate of the land in question ought not to have precluded the defendant from giving in evidence, by way of discount, the claim of third persons to the same land.

Mr. Justice *Colcock* delivered the opinion of the court:

It has been long settled that a purchaser at sheriff's sale has no warranty. The right of the defendant is sold, and if it should turn out that he has no right, or if the property be defective, the purchaser must sustain the loss. The maxim of *caveat emptor* applies. (2 Bay,

169-70. 2 *Const. Rep.* 143, and the case of *Herbemont vs. Sharp, Ante*, 264.)

In addition to the doctrine of law, the defendant had litigated the very title under which he purchased, and may fairly be presumed to have had a knowledge of every claim to the land.

The motion is dismissed.

Justices *Johnson, Huger, Nott* and *Richardson*, concurred.

Butler, for the motion.

Stark, contra.

THE STATE vs. JAMES T. WILLIAMS.

In a capital case, the court *Held* it was not sufficient cause to change the *venue*, that the prisoner swore he believed he could not obtain an impartial trial, because a sum of money had been raised by subscription by some of the citizens of the district to apprehend him, he having escaped from the sheriff.

Newberry district, Fall Term, 1822.

Tried before Mr. Justice *Johnson*.

THE prisoner was charged with the offence of negro stealing, and on being brought to the bar, moved the court for an order to change the *venue*, stating on affidavit that he believed he could not obtain a fair trial in that district. The fact on which that belief was predicated, as stated on behalf of the prisoner, was, that there had been a sum of money raised by subscription by some of the citizens of the district for his apprehension, (he having escaped from the sheriff on his first arrest.) The presiding judge refused to grant the order, and a motion was now made to reverse that decision, on the ground as stated in the brief, viz :

in the name of the plaintiff, was evidently the result of some mistake or inadvertence. It was well known to the plaintiff that this action was carried on in his name, and he never interposed any objection to it.

When the evidence on the part of the plaintiff was closed, the defendant moved for a non suit on the ground that the action would not lie in the name of the plaintiff, as he had passed the note in the manner above mentioned.

The presiding Judge was of opinion that the action might be maintained in the name of the plaintiff with his consent, and that this might be presumed from his knowledge of, and acquiescence in the proceeding. But that the plaintiff, (who was then present,) might, if he thought proper, suffer a nonsuit. He declined doing so, and the motion was refused.

A verdict was found for the plaintiff, and the motion for a non suit was renewed in this court on the same ground.

Mr. Justice *Johnson* delivered the opinion of the court :

The general rule is that an action can only be maintained in the name of him in whom, by the terms of the contract, the legal interest is vested, (1 *East*. 497. 2 *Term* 711.) Upon this principle, choses in action not being assignable at common law, actions on them could only be maintained in the name of the original parties, (1 *Chitty on Pleading*, 10-11,) notwithstanding the actual interest had been passed by assignment, delivery, &c. And it is only under the several legislative provisions on this subject, that the assignees and holders of choses in action, are permitted to bring actions in their own names, and none of these contain any provisions which take away the right to proceed according to the rule of the common law.

Our courts have always regarded the assignment of a chose in action, not negotiable as a letter of attorney to the assignee. The assignee or holder of one that is negotiable, may therefore elect to regard himself in that character or sue in his own name under the authority of the statutes and acts authorizing it.

Superadded to this motion, was one for a new trial, on the ground that the defendant proved the payment. This ground is clearly without support, as the preponderance of the testimony was against it.

The motion is refused.

Justices *Colcock, Nott, Gantt, Richardson* and *Huger*, concurred.

Noble & Wardlaw, for the motion.

Downs, contra.

HUGH MCCALL vs. RICHARD SMITH.

A. sold a negro to B. and took his note with C. as security for a part of the purchase money. Judgment was obtained on the note, but it was not satisfied; the court *Held* that in an action by B. against A. for a fraud in the sale of the negro, C. was an incompetent witness.

Tried at Richland, Spring Term, 1823.

THE defendant had sold a negro to the plaintiff, and took his note with *Joseph May*, as security for a part of the price. He had brought several suits against them on this note, and obtained judgments, which were not yet satisfied. This was an action to recover damages for a fraud in the sale of the negro, and to prove it the plaintiff offered in evidence the examination of *May*, taken by commission. The presiding judge was of opinion that *May's* interest in the event of the suit rendered him incompetent. The plaintiff then moved to continue the cause with a view to render *May* competent by payment of the judgment on the notes, and to obtain the opportunity of examining him *de novo*.

The application was refused by the court, and the plaintiff being unable to prove his case, was non-suited.

did, when the scale of depreciation was fixed, and the value of the currency at that time was seven for one.

The motion must therefore be granted.

Justices *Johnson, Huger, Richardson* and *Nott*, concurred.

O'Neal & Johnson, for the motion,
Bauskett & Dunlap, contra.

WILLIAM P——R. vs. CHARLES BOGAN.

A variance between the writ and declaration can not be taken advantage of in arrest of judgment; it must be by plea in abatement or demurrer.

The words *vi et armis*, do not necessarily make a writ in trespass; a writ may still be case and contain these words as surplusage.

Tried before Mr. Justice *Colcock*, Spartanburgh district,
Spring Term, 1822.

THIS was an action by the father to recover damages of the defendant, for debauching his daughter, whereby he lost her services. The plaintiff had obtained a judgment by default. The defendant filed a general demurrer to the declaration, (as it stated,) which was intended to reach a defect in pleading, which was alleged to exist, to wit; a variance between the writ and declaration.

The demurrer was overruled and the testimony given.

It was proved by the girl herself, that she had been delivered of a bastard child, and that the defendant was the father of it, and that she had been very sick for some time after. It also appeared from other testimony, that the defendant had made honorable address to her, and it was believed would marry her; that she was about fifteen years of age at the birth of the child.

On the part of the defendant, it appeared that two other

sisters had had illegitimate children, and that their general reputation had been bad. That the young men who visited the house were allowed too much familiarity. But it was not proved that the father had any reason to suspect the defendant of dishonorable views, or that the misfortune had been induced by his conduct.

The jury found a verdict for the plaintiff for \$ 300, and a motion was now made for a new trial and in arrest of judgment, on the following grounds :

1st. Because the declaration varies from the original writ ; as the one is in case and the other in trespass *vi et armis*.

2nd. Because the court ought to have supported the demurrer to the declaration.

3rd. Because the damages were excessive ; as it was clearly proved that the plaintiff's daughter was a girl of no character, and was of no real service to the plaintiff.

4th. Because the verdict was contrary to law and evidence, and the express charge of the Judge, who stated to the jury that if they believed that the father had connived at the conduct of the defendant towards his daughter, then they ought not to give more than nominal damages, and this was clearly proved.

Mr. Justice *Colcock* delivered the opinion of the court ;

Upon the first ground, it is only necessary to refer to the cases of *Anthony Haney vs. John Townshend*, (1 *McCords Rep.* 106,) and the case of *Young and Grey*, (*Ibid*, 211,) by which it will appear that such variance is not a ground of arrest, but may be taken advantage of by plea in abatement or special demurrer.

On the second ground, the demurrer complained that the declaration was bad, but on examination, there appeared no defect in form or substance. It was contended that under this demurer the court was bound to look back and discover the alleged variance. This might have been true as to a defect in the substance but not as to form, (1 *Chitty*, 640.) But if the court had been bound to notice

what is alleged to be a variance, I am of opinion that there is in point of fact no variance ; for although the words *vi et armis* are used in the writ, it is in all other respects a writ in case, and these words may be considered as surplusage.

As to the two last grounds, the facts were all submitted to the jury who knew the parties and witness, and were of course well acquainted with the manners and customs of the country, consequently were qualified to decide whether there was any connivance on the part of the father. Having decided that there was none, the damages cannot be considered as excessive.

The motion is dismissed.

Justices *Nott*, *Huger*, *Johnson* and *Gantt*, concurred.

Fleming, for the motion.

Thompson, contra.

JONATHAN ECCLES vs. JOHN G. BALLARD, Indorser.

An indorser to a note made payable to *bearer* is liable as upon a new bill to the bearer.

Whether there was any artifice used to get the indorsement, or if it was made under circumstances that would exempt the indorser from liability, is for the jury ; and the question of diligence in making a demand on the drawer and notice, in the same manner depend on circumstances, and must be left to the jury.

Kershaw district, Fall Term, 1822.

Tried before Mr. Justice *Gantt*.

THIS action was brought against the indorser to the following note—"Ten days after date, I promise to pay to *John G. Ballard*, or bearer, the just sum of three hundred dollars, for value received of him this 26th March, 1821.

Signed,

JOHN BOYKIN."

Indorsed—"I promise to pay the within note if the drawer should fail to do so, to *Jonathan Eccles*, for value received.

Signed,

JOHN G. BALLARD."

The facts proved were that the note was presented for payment six days after it became due, to the drawer, who refused to pay, of which the indorser received immediate notice. It was further proved that the drawer lived seven miles from Camden, the place of residence of the indorsee and indorser, and that there was no post office nearer the drawer's residence than Camden. The hands writing were admitted. It was then proved that the indorsement was filled up after it had been signed, and that when made, the plaintiff declared it should only be used as an authority to receive the debt; on which testimony, the presiding judge ordered a nonsuit, on the ground that the evidence did not support the counts in the declaration, under the usage of merchants.

A motion was now made to reverse the order for nonsuit, on the ground that the action will lie against an indorser on a note payable to bearer, and that due diligence was proved.

Mr. Justice *Colcock* delivered the opinion of the court:

The first point to be decided in this case is, whether the indorsement of a note, payable to bearer, creates a legal liability in the indorser to pay the note, and on this point I am satisfied; for the note was negotiable in its nature, and although it would pass by delivery, without indorsement, yet if one choose to put his hand on it, it shews that it passed from him, and is a new bill to pay to the bearer; (*3 Johnson's Rep.* 439. *Lovell's On Exchange* 40; *Maxwell On Bills*, 48.) The action then could be maintained on this indorsement; and the next questions are, should not the question of diligence and the alleged fraud in the obtaining and using the indorsement been left to the jury for their determination, and on them I think there can be no doubt? Whether there was any artifice

used to get the indorsement, or if it was made under such circumstances as would not render the indorser liable, were facts that ought to have gone to the jury. (*See 2 Const. Rep. 33, Rapp vs. Davidson.*) And in the same manner, the question of diligence which may depend not only on the distance at which the parties reside, but a variety of other circumstances should have also been left to the jury. The non-suit was improperly ordered, and the motion is therefore granted.

Justices *Johnson, Huger, Richardson* and *Nott*, concurred.

Lery & McWillie, for the motion.

Carter, contra.

ROBERT THOMPSON vs. ALEXANDER CALDWELL.

Irregularities in legal proceedings cannot be taken advantage of by third persons.

An executor in his representative capacity, cannot hold lands adversely from the title of his testator.

But under certain *bona fide* circumstances, an executor's possession may be adverse from the title of his testator.

The executor has not the legal right of entry on the land of his testator, unless they be charged with the payment of rent, which rents may be assets in his hands.

Fairfield district, Spring Term, 1822.

Tried before Mr. Justice *Johnson*.

TRESPASS to try titles to land.

The plaintiff traced his title from the original grantee through a deed from *James Barkley*, sheriff, to *James Douglass*, down to himself. *Barkley* sold under an execution, *Alex. McCluken ads.* surviving

executor of *Alexander Miller*. In looking into the proceedings, the defendant made the following objections,

arising out of the proceeding itself, which was a *sci. fa.* to revive a former judgment.

1st. That the *sci. fa.* was not personally served.

2d. That no declaration had been filed, notwithstanding the demand was above the summary jurisdiction, (£20.)

3d. That more than a year and a day had elapsed between the return of the *sci. fa.* and the judgment, and there was no intermediate proceedings.

4th. That the judgment was not rendered or signed before the *fi. fa.* was lodged in the sheriff's office.

The *fi. fa.* was entered 2d March, 1817, and judgment signed 10th May following. A levy was made 3d June, and a sale 7th July, 1817.

These objections were over-ruled.

The defendant claimed under a younger grant to his father, who was one of the executors of *Miller*, the grantee, under whom the plaintiff claimed. This grant was all the written evidence he produced, and he proved that by the permission of his father he went on the land, and held the possession under which he claimed.

The presiding judge held, that the defendant's possession must enure to the benefit of his father, and that his possession could not affect the rights of the plaintiff, because as executor he had the right to the possession, and was bound to defend the possession of his testator.

Motion for a new trial.

Mr. Justice *Colcock* delivered the opinion of the court:

There can be no doubt that the verdict in this case was predicated on the opinion of the presiding judge, as to the legal character of the defendant's possession. Where an executor enters in his representative capacity, he certainly cannot be considered as holding adversely. But whether he so entered, is a question of fact for the jury.

Besides, he has not the legal right of entry on the lands of the testator, unless they be charged with the payment of rent, which rents may be assets in his hands. But,

generally speaking, the lands descend to the heir; and from the testimony in this case, it certainly did so. It was not charged with the payment of rent. It had been lying out waste and uncultivated for nearly 30 years, and there is no reason to believe that the executor did know that it was the land of his testator at the time he obtained the grant. Indeed, it is not clear that the grant was obtained after his death; for the time of his death is not fixed positively. It depends on the recollection of an old man, engrossed with the ordinary concerns of life; and it is well known how difficult it is to fix on the *precise* time when such a circumstance has happened again. The grant of *Samuel Caldwell*, (the executor,) whenever obtained, does not cover the whole of *Miller's* grant. It only takes a part of it, which gives the transaction the character of a mere mistake in regard to the rights of *Miller*, or of any other with whose right his grant may conflict. From the testimony of Mr. *Cork*, it appears that the grantee of the plaintiff, (*Miller*,) died about 33 years ago; according to this, (if his heir was only one year old when he died,) the heir would have been now 34, and would have been barred by any adverse possession at least nine years ago, about the time the defendant took possession—so that it is impossible to suppose that any fraud was practised or ever contemplated by the defendant or his father. Upon the whole, all these circumstances should have been submitted to the consideration of the jury, and they should have been left to decide whether the possession was adverse.

As to the grounds of non-suit, it is only necessary to refer to the cases of *Turner & McCrea*, (1 *Nott & McCord*, 11,) and *Barkley & Scriven*, (*Ib.* 408,) in which (as well as in many other cases,) it has been decided that these irregularities cannot be taken advantage of by third per-

Sons. The motion for a non-suit is of course dismissed, but the motion for a new trial granted.

Justices *Richardson* and *Nott*, concurred.

Mr. Justice *Gantt* dissented.

Pearson, for the motion.

Williams, contra.

THE STATE vs. JAMES WILLSON.

No order of Religion can exempt a man from serving as a grand juror.

Sci. fa. tried before Mr. Justice *Richardson*, York district, Spring Term, 1823.

THE following was the brief :

“ A *sci. fa.* had been issued against the defendant to shew cause why he should not be fined for his non-attendance as a grand juror, at the special court for York, in August term, 1822. The defendant shewed for cause that it was against his religious persuasion in many cases, to sit as a juror ; and as such, it would be a violation of his conscience, by which, he would be rendered obnoxious to the punishment of Almighty God. That he did not know the court could permit a juror to withdraw from the jury box on a particular trial, but had been told when once sworn, that he was compelled to sit out the whole term. The court was informed that others had been excused by judges for like causes, but held them insufficient. The defendant is only desirous that the Constitutional Court shall settle the question, that the body of christians to which he belonged, may no longer depend on the uncertainty of opinion, but the certainty of law.

The defendant therefore moves to reverse this decision on the ground,

certain instances of individuals being excused, as well as an appeal to good feelings, plainly interwoven in the brief. And no doubt, instances have occurred, and will again occur, where the parties attended at the time required by law, but there being superfluous jurors, were readily excused. But in the case before us, a justification is offered after an actual default, and the right of *exemption* claimed. And when a mere principle is to be decided, any appeal to human generosity must receive the answer given by sir *Matthew Hale*, when importuned untimely for mercy. "I must have mercy on the country. In such cases, we are the ministers of the law, her decrees constitute our justice, and in that sense *fiat justitia, ruat cælum*,"

Finally, I will not conceal the hope that this unanimous decision of all the judges, may have some tendency to reconcile the community concerned, to the requisitions of the laws. Nor will I restrain the observation, that while religions differ so much in doctrine, they all agree in this, *that man is bound to do his duty in whatever situation he may be placed* by the God, whom he adores; a principle, which reconciles even the slave to his master. And further, that amidst the growing distinctions among ourselves, upon doctrinal tenets, yet there is no christian sect which does not enforce by precepts and example, the plain moral, so often inculcated and invariably practised in every place by *him* "who cleansed us of our foulest crimes," of a ready obedience to the laws of the country, wherever he sojourned. The covenanter will then, in common with all good men and christians, "obey the powers that be," respect the laws which protect him, his property and character, and venerate the principles of a constitution, which, in order to render him and all others, independent of human control in religion, established no one favored form of worship; and avowing the vain pretence of dictating, human creeds, require, notwithstanding, the essential sanction of an oath, which presupposing an everlasting soul, devoted to an intelligent first cause, who is to re-

ward and to punish, is of itself, a recognition of religion as a principle.

If there is a principle in which the christian and moralist, the philanthropist and the patriot may join with one accord, we have it here; where the human mind is left unfettered to enforce truth or combat error; and the soul of man freed from human ties, is bound only to Almighty God.

The motion is dismissed.

Justices *Johnson, Gantt, Huger, Colcock* and *Nott*, concurred.

Clarke, for the motion.

Williams, contra.

~~CHAS. B. MORRIS vs. WILLIS FORT.~~

CHARLES B. MORRIS vs. WILLIS FORT.

A declaration on a note "to pay whenever after requested" is not proved by the production of a note payable 90 days after date.

The rule requiring copies of all notes and contracts sued on, to be attached to the declaration, does not excuse any irregularity of pleading.

Debt on a sealed Note.

THE declaration in setting out the promise, stated that the defendant bound himself to pay whenever after requested.

The note produced in evidence was a promise to pay ninety days after date.

A non-suit was moved for on the ground that the note offered in evidence did not support the declaration; which was over-ruled, and a verdict was had for the plaintiff.

The present motion was to reverse the decision below, and for leave to enter up a non-suit, on the ground that the deed offered in evidence varied from the one declared on.

Mr. Justice *Gantt* delivered the opinion of the court :

The declaration must state the contract on which the action is founded, truly and correctly. That is, either in the terms in which it was made, or according to the legal effect and operation of those terms, otherwise a material variance between the contract alleged, and the contract proved, will be fatal. If the contract as stated in this declaration was correct, then the plaintiff might have brought his action before the expiration of ninety days from the time of the contract ; but by the terms of the note produced in evidence, the defendant was allowed 90 days to pay the debt. This variance is material, and of the very essence of the contract. The rule of court requiring that a copy of the cause of action shall be filed with the declaration, does not dispense with the necessity of legal precision in drafting a declaration. If it were so, then it would be unnecessary to declare at all. The copy of the cause of action would alone suffice. This decision may delay the plaintiff in the recovery of a just debt, but the rules of pleading must prevail, and it is very clear that the allegation in the declaration was not established by the note which was offered in evidence.

The motion for allowing leave to enter up judgment of non-suit must prevail. (*See 1 Selwyn's N. P.* 116.)

Justices *Nott*, *Richardson* and *Johnson*, concurred.

Caldwell, for the motion.

Miller, contra.

GEORGE A. STOCKMAN vs. JOHN RILEY.

Notice of non-payment must be given to one who indorses a note after it becomes due, as to an indorser of a note before it becomes due.—
(a.)

THIS was an action against the defendant, as indorser of a note after it became due. No notice of non-payment

to the indorser was proved on the trial, and on the charge of the presiding judge that the note having been indorsed after due, such notice was not necessary, a verdict was given for the plaintiff; and among a variety of other grounds misdirection to the jury in the foregoing particular, was relied on for a new trial.

Mr. Justice *Gantt* delivered the opinion of the court:

The charge of the presiding judge in drawing a discrimination between a note indorsed before and after due, so far as respects demand and notice, has no foundation in law for its support. The same reason why diligence should be observed exists as forcibly in the case of a note indorsed after due that does when the time of payment has not arrived. I had almost said in a greater degree, for if the circumstance of the time having passed when payment should have been made, goes to lessen the credit of the drawer from supposed inability to pay, then the person upon whose credit the holder relies, should be promptly informed of non-payment, and ought not to be lulled by the *laches* of the holder into a false security that the note has been paid.

As an instrument negotiable in its nature, a contract by the indorsee to take it, although after due, imposes upon him the duty of using the same diligence which is required by the law in transactions of this nature.

The motion for a new trial, on the grounds of misdirection, is granted.

Justices *Colcock* and *Richardson*, concurred.

O'Neal & Johnson, for the motion.

Caldwell, contra.

(a.)—*Vide Course & McFarlane vs. Shackelford*, (2 Nott & McCord, 283.) *Poole vs. Tolson*, (1 McCord, 199.)

**Y. J. HARRINGTON vs. THE COMMISSIONERS OF THE
ROADS OF NEWBERRY DISTRICT.**

A clerk of the court is exempt from working on the roads.

The decision of the commissioners of the roads, on a question within their jurisdiction, is conclusive. (a.)

Motion to set aside an order for prohibition.

Before his honor Judge *Gantt*, at Chambers.

THE commissioners of the roads of Newberry district had imposed upon *Y. J. Harrington* a fine for not working upon the roads, and were about to collect it in pursuance of the method pointed out by the act of the Legislature. The order for a writ of prohibition was granted on the ground that the duties required to be performed by Mr. *Harrington*, as clerk of the court, are incompatible with the services required by the commissioners of the roads.

This was a motion to set aside that order on the grounds :

1st. That the question of Mr. *Harrington's* liability to work on the roads belonged exclusively to the commissioners of the roads, and over which this court has no jurisdiction.

2d. Because clerks of the court are not exempted by law from working on the roads.

Mr. Justice *Gantt* delivered the opinion of the court :

On the first ground it need only be remarked that the superintendency of this court, and the high discretion with which it is invested, extends to all inferior jurisdictions, and is to be exercised when they exceed the bounds assigned to them, either by assuming jurisdiction where none is given, or exceeding it in any stage of their proceedings contrary to law. The case of the *State vs. John Hudnall and others*, reported in 2 *Nott & McCord*, 419, among several others decided by this court, is illustrative of the correctness of this position.

(a.) See *State vs. Dellesceline*, (1 *McCord*, 52.)

In that case, one of the grounds relied on was, that the jurisdiction of magistrates and freeholders *quoad* the matter before them was final and conclusive, and that after sentence this court could not interfere by prohibition to suspend its execution; but it was determined that the prohibition had been properly awarded. The following clause in the act of the 22d March, 1785, is relied on as giving to the commissioners an authority so overwhelming as not to be controlled by this court. "The said board of commissioners are hereby authorized to declare and ascertain when the same is not ascertained by law, or when doubts may arise concerning the same, what inhabitants are liable to work on any road or part of a road in their respective parishes and districts." The conclusion to be drawn from this clause is, that where the law does ascertain the exemption, then the commissioners have no power to declare the exempted persons liable to work on a road or part of a road.

If Mr. *Harrington*, therefore, as clerk of the court of Newberry district, was by law exempted from working on the roads, and this exemption properly pleaded when summoned before the commissioners, (a fact which is not denied,) the enforcement of a sentence to collect the fine imposed under a distress warrant, would be illegal and oppressive.

It remains to examine the second ground, whether Mr. *Harrington* was by law excused from working on the roads. The 9th clause of the act of 1789, (*P. L.* 487,) prescribing the duties of clerks, declares, "that all and every person or persons shall and may, at *all times* of the day, from 9 o'clock in the morning till 4 o'clock in the afternoon, (Sunday excepted,) have free access to any of the clerks offices in the respective districts."

The 6th clause prescribes the oath of office—"well and faithfully to do and perform the several duties enjoined by laws now passed, or which shall hereafter be, as clerk of the district court." The 12th clause declares, that "if any of the clerks of the court aforesaid shall omit or ne-

glect to do his duty in the premises, he shall forfeit and pay the sum of £ 200, the one moiety to the party or parties aggrieved, and the other moiety to him or them who shall sue for the same in any of the district courts of this state. He is required to enter into bond with three good and sufficient securities in £ 2000 for the just and faithful discharge of his duty, and is to reside at the place where the court is held. The conclusion to be drawn from any correct view of these clauses of the act is, that the law has so specifically appropriated the time of the clerk for the performance of the duties required of him, that he would act in direct violation of the law were he to leave his office and go to work on the road. As keeper of the records of the district, the most ready access should at all times be afforded to those who have business to transact in his office. Exigences may arise when the mischief and injury to individuals would be incalculable, if the clerk might elect to leave his office and go to work on the road. As, therefore, the duties prescribed by law to the clerk, are altogether incompatible with what was required of him by the commissioners, and both being personal duties, it is the opinion of this court that the commissioners were properly restrained by prohibition from enforcing their sentence.

The motion to set aside the order made at Chambers, must fail.

Justices *Nott*, *Huger* and *Johnson*, concurred.

Mr. Justice Richardson :

The question submitted, is whether a clerk of the Circuit Court is exempted by law, from working on the high roads, &c. and if so, whether a prohibition shall issue, to save him from the lawful fine laid by the commissioners of the roads for refusing to work, when regularly summoned so to do ?

It must be borne in mind, that if the occupation of the clerk, in his office, was offered as a mere reasonable excuse for not obeying the summons upon the particular occasion, then a prohibition could not be issued. For in or-

der to authorize the issuing of such a process, it must appear that the commissioners of the roads have acted not merely unreasonably in rejecting a good excuse, but that they have undertaken to fine an officer, who is altogether exempt from the performance of the duty required, upon that, and every other occasion, without any appeal to their judgment or discretion. Now is the clerk thus privileged? I hold the negative, and support it by the following plain and allowed principles. Every citizen is bound, in return for the protection received from his government, to make all those pecuniary contributions and do all those personal services which are required of him, in common with his fellow citizens; and in default of rendering such services, to pay the fine or penalty fixed by law, which is the usual, if not the only practical mode of exacting personal services. Without this principle of obedience, no government could be stable or permanent: And of all services, those of working on the roads, as well as of doing patrol and military duty, are the most interwoven with our habits, laws and necessities, since the first settlement of South Carolina. From the performance of patrol duty, there are a few persons expressly exempt; from militia duty, many; and from working on the roads none, above or below a certain age. But a constructive exemption has never before occurred.

Can an office create any exemption? Office is the reward of virtue, talents, and fidelity. It exempts the officer from no civil duty; but binds him even closer to the constitution and laws, by exacting of him an oath, in addition to his general obligation, that he will obey, maintain and protect them. There is nothing in the character or duties of an officer which does not co-operate with his oath, to enforce entire obedience to the claims of the law.

He is invited by the expectations of his fellows, he is led by duty, persuaded by gratitude, bound by reward, and he has sealed all these sanctions by an oath to discharge his civil duties. If the officer be necessarily employed in his office at the moment he is summoned to do personal

service elsewhere, he has then a rational excuse ; as any man may have upon the unexpected occurrence of momentous business, misfortune or sudden sickness in his family, &c. *But excuse is not exemption.*

In the discharge of his civil and official duties, an officer is in the situation of a man who has contracted to do several acts, the performance of one is no excuse for his failure in another ; having undertaken to do all, his contract binds him to that extent. What would we say to a man who holds two offices, as clerk and ordinary, and being impeached for neglecting the duties of the ordinary, should plead that he was occupied altogether in the duties of the clerk, at least from 9 to 4 o'clock, by express law. Every officer is precisely in that situation ; he is a citizen and has certain duties to perform in common with others, and he holds an office, by virtue of which he undertakes to discharge its duties without diminution of the former obligation. In addition to two or three offices, the officer may be a clergyman, and then he has greater and more duties still. But he must discharge *the whole* of his voluntary obligation to society.

If once the door be opened, by construction, for any officer to escape from the duties of the citizen, the lock is not opened, but the key is useless, and the bolt broken ; and however narrow the first opening, there will never be wanting hands to push it wide, and those will be the hands of the strong, the sagacious, and the interested.—Clerks, sheriffs, ordinarys, judges, magistrates, collectors and militia officers, of whom in this regard there is not a class, but of whom it may be said as of the greater *Ajax-ipse agmen*. If the President of the United States were to claim the privilege of a total exemption from any general civil duty required of the citizens of the state where he resided, I would reply to him—first, throw off the protection of your person and life, your property and character, afforded to you *by the state government*, and then you are exempt. This is the tax laid upon your person to be paid in labor. If you cannot do the labor, the law ad-

mits of any reasonable excuse to be judged by the proper authority ; but having offered none you must pay the fine, which is at once the substitute for your labor, and the price of our protection. Your office affords no privilege, and only binds you more closely down to obedience, and you are still liable to be burthened according to the exigence of that local government, which in return for services, holds her Ægis over your person and property.

The principle which I have heretofore noticed is perhaps too plain to have required illustration. But as this is the first case in which a constructive privilege of exemption from a general civil duty has prevailed, I deem the case of no small importance ; and fearing an unlucky infraction of a fundamental principle, I may be excused for exhausting a little time. But although the general principle is admitted, the exception in favor of the clerk is supposed to be warranted by the act which directs that clerks shall keep their offices open every day from 9 to 4 o'clock. Now the utmost that can be made of this enactment is, that the clerk would have a reasonable excuse between 9 and 4 o'clock ; and then before 9, and after 4 o'clock, he is not exempt. The very restriction therefore to 7 hours in the day, proves that he is at least liable at some time ; and it follows that he can have no entire exemption, which is the *sine qua non* of the prohibition issuing.

But it appears to me, that taking the act in connection with the principle before relied upon, and it will authorize no such construction. Before the act, the clerk was bound to perform all the duties of his office, and work upon the roads too ; and the act lessens neither duty, but merely confines those who call upon the clerk in his office to seven hours ; and thereby gives to the clerk an excuse for doing no official business during any other hours of the day. Before the act, he was liable to be called on without restriction of time. But let us exhibit the extent to which the exemption may be carried, and we see at once the danger of allowing the clerk the privilege in any

case. If privileged in this, he must be equally exempt from every obligation to do any other personal service out of his office, at least from nine to four o'clock. But he is required among other civil duties, to make a return personally to the tax collector, of all his taxable property or be fined in a double tax. The collectors office is open from nine to two o'clock. Now if the clerk fail to make his return, shall prohibition go to save him from the forfeit, because he was kept by the law in his office? The court sets semi-annually in every district; and it is essential to the discharge of the business that the clerk should attend the court. Now may he reply when called, that he will attend the Judge after four o'clock; or rather that being required to keep his office open seven hours, he will not attend the court at any hour, as the law makes no fractions of a day. But what is the proper reply to all such claims of the clerk? It is simply that he is bound to do all the duties required of a citizen of the country, and he has undertaken to discharge those of a clerk also; he must then perform both, and if he fail in either, he must pay the penalty for his neglect, unless those who have the power to excuse him will do so. My fears arise from the consequences which will assuredly follow. If the clerk were to be the only officer thus privileged, I should not greatly regard it, but the peculiar reason given for this exemption will not be regarded. The principle received, will, and must be, that *an officer understood to be occupied in his official duties* becomes exempt, whether it appeared by statute or common law. Now what officer is not in this situation? Has a sheriff, or judge, or any of the heads of department more time to spare than the clerk? *I suppose less.* Here, though I am met by the expressions of the act; but something peculiar may be found in every case, and future judges will look to the principle alone, and lay aside the guards and qualifications. The *people will not comprehend such subtleties.* The practice of the country will be upon the general principle. Other officers will be excused and considered exempt. Some cir-

suit decisions will be predicated upon the habit of expectations of the country.—Finally, another qualified decision will creep in, and the two will be enough to beget a race of exempts that may put at defiance the principle to which we are allowing only *one* harmless *exemption*. But these little exemptions in favor of individual privileges are as contagious as the leprosy.

Who, that will reflect for a moment upon the wide extent, to which too early adjudications, infracting common law rules have been carried, but will hesitate in making constructive exceptions to settled principles.

When, at an early period, the judges decided that as a purchaser of a negro without warranty might recover back the price paid if the negro turned out unsound, the decision was in favor of a favorite and valuable species of property ; of the diseases of which too the seller could not be altogether ignorant in general, because the negro has understanding and will tell of his complaint, &c. It was too of that property of which the common law does not treat ; and concerning which the civil law is very conversant.—It seemed then somewhat allowable to call in the aid of the civil law in the *particular case*, (1 Bay, 319.) In the very next case reported, (1 Bay, 474,) we find the judges, fearing lest all contracts should be set afloat.

But the new principle had got abroad, and although every new set of judges have deplored its growth, we find the principle deduced from the first decision fairly applied to every species of property ; and every piece of mechanism from a steam-boat down to a Yankee clock.—Had the first judges been asked how far the innovation was to go, the reply would have been, *only to slaves*.

This species of property being unknown to the common law, we must look elsewhere for the rules concerning it, as a matter of necessity ; but succeeding judges looked only to the plain principle established, *that full consideration implies a warranty of soundness in every thing*. And now under the influence of the principles thus extended, we find practically established in juridical pro-

ceedings, a species of eminent domain to model, make or break contracts. It must be admitted that as applicable to a particular species of property, there were great reasons to introduce this doctrine ; and that with all the uncertainty which has followed, there is a moral beauty throughout which almost compels us to pay to it the compliment of the poet to his mistress :

“ If to her lot some female errors fall,
Look in her face and you'll forget them all.”

Turn to the innovation in the principles of evidence, and ask if the judges, who at an early period, allowed a merchant to prove his accounts by simply swearing to the original entries made by himself, without proving a delivery of the goods to his debtor, even foresaw that in direct pursuance of that little innovation afterwards, if the merchant left the country, all his attorney would have to do was to prove the hand-writing of the merchant, or that whenever the clerk who made the entries has gone off, no matter for what cause, all that was necessary in a court of justice would be to prove the clerk's hand-writing. I would venture to suppose that this innovation upon the doctrine of evidence began with the express reservation *that the merchant must in every instance appear in open court* to be cross-examined ; and that no judge foresaw that his bare hand-writing, or that of his clerk, would be afterwards received in place of his oath. Judge *Burke* in his last will declares, *that but for this modern rule of evidence, he would believe his estate worth something.* These are solemn warnings to shew the danger of constructive exceptions to settled principles. A principle once surrendered in a particular case is no longer firm, but trembles at every new attack. As then, in treating of great principles, we would willingly say, “ *esto perpetua :*” So in resisting the first encroachments, our rule should be “ *obsta principiis.*”

“ Stop innovation in its early stage,
For when the *upstart* thing grows strong from age,
“ No time, nor strength of tenets stop its rage.”

Colcock, Justice, concurred with Judge *Richardson*.

Bausket & Dunlap, for the motion.

O'Neal & Johnson, contra.

ROBERT BELL vs. MATHEW HUTCHINSON.

The court may, before going into trial, grant leave to the defendant to withdraw a plea of justification, when it can do no injury to the plaintiff.

A judge may, at his discretion, request a jury to reconsider their verdict.

Tried before Mr. Justice *Richardson*, Fairfield, Spring Term, 1823.

THIS was an action of slander, for charging the plaintiff with stealing a pen knife and handkerchief.

The defendant pleaded not guilty to the first charge, and justified as to the second.

Before the commencement of the trial, the defendant's council moved the court to withdraw the justification, and the court granted the motion, although opposed on the part of the plaintiff.

The jury found for the plaintiff one dollar damages, but informed the court at the time of delivering in their verdict, they intended the defendant to pay the costs of the suit, as they had understood one cent would carry costs.

Upon this statement of the jury, the counsel for the plaintiff moved the court, that the jury might be permitted to reconsider the verdict ; but the motion was refused, and the verdict recorded, as delivered in.

The plaintiff moved the Constitutional Court for a new trial, on the following grounds :

1st. Because the court ought not to have permitted the defendant to withdraw his justification without leave of the plaintiff.

2nd. Because the court ought to have permitted the jury to correct their verdict, in as much as the same was founded in a misapprehension.

Mr. Justice *Richardson* delivered the opinion of the court :

That the court may permit a defendant to withdraw his

plea before going into a trial, when such withdrawal does no injury to the plaintiff, is clear, and that the court may permit or direct the jury to reconsider their verdict, has been too often done to be less evident. But that the court is bound to do so, at the request of the counsel of a party who may dislike the verdict rendered, would be strange indeed. The suggestion was to the discretion of the court; and as the jury had separated by consent of parties, after making up their verdict the night before, and as they could not give costs but by increasing the verdict, which had been actually published, more than twelve fold, i. e. to £20 currency, the precedent might have been of evil tendency.

The motion is therefore dismissed.

Justices *Nott*, *Gantt*, *Collock*, *Huger* and *Johnson*, concurred.

Clarke, for the motion.

Peareson, contra.

CASSANDRA J. JENTRY vs. JAMES HUNT, Sheriff.

The sheriff is liable for a trespass in his deputy's taking and selling under an execution, the property of the wrong person.

Motion to set aside nonsuit.

Tried before Mr. Justice *Johnson*, Spartanburgh court,
April Term, 1823.

THIS was an action of trespass *vi et armis*, against the late sheriff of Spartanburgh, for executing and selling the property of a third person.

It appeared in evidence, that a special deputy went to the house of the plaintiff's father, *Reuben Jentry*, with an execution against his property, and a special deputation to levy on his effects: That he levied on a bay mare and

colt, the property of the plaintiff, as her father's, being found outside of all enclosures, and the plaintiff immediately informed him that the mare and colt were her property, and forbade his further interference with them. He afterwards levied on some other property of the plaintiff's, viz: one colt, cows and household furniture as her father's. On the day of sale, she made known to the deputy her claim to the property, and forbade the sale; notwithstanding which he sold the property.

The plaintiff clearly established a right in part of the property, but the court ordered a nonsuit, because the deputy had not pursued the orders of his deputation.

The plaintiff now moved the Constitutional Court to set aside the nonsuit, on the following grounds, viz.

1st Because the sheriff is liable for the trespasses committed by his deputy in an official capacity, whether done with, or without his consent.

2nd. Because the acts of the deputy, under an execution delivered him by the sheriff, are the acts of the sheriff himself, and he is liable for any injury sustained thereby.

Mr. Justice *Colcock* delivered the opinion of the court:

From the view which was presented of the facts on the trial below, the presiding judge thought that this case might form an exception to the general rule that a sheriff is liable for the acts of his deputy. (*1 Douglass*, 43, n. 3. *2 Term Rep.* 148.) But on a view of them, the court is unanimously of opinion that the sheriff is liable, if the property be that of the plaintiffs, for any damages which she may have sustained by the unlawful taking. (See the case of *Sanderson vs. Baker & Martin*, (*2 Black* 832, and *3 Wilson* 309.)

The case ought to have been submitted to the jury, and the motion is therefore granted.

Justices *Richardson*, *Johnson*, *Huger*, *Gantt* and *Nott*, concurred.

J. W. Farrow, for the motion.

P. Farrow, contra.

J. RIGHTON, Adm'r of THOMAS FULLERTON, *vs.* THOMAS SUMTER, the elder, & THOMAS SUMTER, the younger.

It is not a sufficient ground for postponement, that the plaintiff discontinued as to one of the defendants. It is not such an amendment as will entitle the defendant to a continuance.

Tried before Mr. Justice *Colcock*, Sumter Court, Spring Term, 1823.

THIS was an action brought on a bond signed by Gen. *Sumter*, for himself and for his son, as his agent. The plaintiff proved the hand writing, and the defendant's attorney required proof of the agency, (or the special authority,) to sign this bond. On which, the plaintiff, not being able to prove it, moved for leave to discontinue as to *Thomas Sumter*, the younger, (whose name had been signed to the bond, by his father,) which the court granted.

The defendant then moved for a continuance of the case, on the ground that when an amendment was made after plea, the opposite party had a right to a continuance.

This was refused.

It was not made to appear, (nor indeed, could it well be conceived,) that the remaining defendant would necessarily be obliged to vary his defence.

A verdict was taken for the plaintiff, against *Thomas Sumter*, the elder; and a motion was now made to set aside the verdict, on the ground that the defendant had a right to a continuance, the plaintiff having been permitted to amend.

Mr. Justice *Colcock* delivered the opinion of the court:

This is not an amendment, it is a discontinuance or *nolle prosequi*, (1 *Tidds Practice*, 628-630,) as to one defendant, which does not necessarily change the defence. Any alteration in the body of the declaration, either in form or substance, would necessarily require an al-

teration in the pleadings, and then, there may be a necessity for other witnesses, than those who had been subpoenaed, consequently, a good ground of continuance. Here the plea was *non est factum*, and it was as competent for the remaining defendant to have supported his plea after his co-defendant's name was stricken from the record, as it would have been had it remained. There may have been a difference, but if there was, it is presumable the defendant was not prepared to support it.

The motion is dismissed.

Justices *Richardson*, *Johnson* and *Huger*, concurred.

Mr. Justice *Nott*:

I concur in this opinion, on the ground that the defendant signed the name of his co-obligor himself as his agent, and on the trial disavowed his agency, and therefore it became his own several bond.

Mayrant, for the motion.

De Saussure, contra.

EDMUND WARE vs. GEO. WEATHNALL, Executor of A.
C. JONES.

Upon a failure of a warranty of title to personal property, the rule of damages is the price paid for the property, with interest from the time of the purchase.

The same rule of damages, it seems, applies as well to real as personal property.

Abbeville district, Fall Sitting, 1823.

Tried before Mr. Justice *Colcock*.

THIS was an action to recover damages for a breach of covenant in the sale of a negro girl who was sold for 300 dollars, and the title warranted in the bill of sale.—When the recovery was had against the plaintiff, there

had been an increase both in number and value, and the verdict against him was for \$2,250.

There was an attempt to prove a fraud in the intestate, but as it was not thought to be successful, the determination of the case was not affected by any consideration of the effect which might be produced by the proof of fraud.

The presiding judge below directed the jury to find for the plaintiff the price paid, and interest ; which they accordingly did.

A motion was now made for a new trial on the ground of misdirection, the plaintiff contending that the true measure of damages is the value of the property at the time of eviction.

Mr. Justice *Colcock* delivered the opinion of the court :

The consideration of this question presents no ordinary difficulties. The most distinguished judges of the United States are arrayed in opposition. The mind is distracted between the apparent justice and morality of the civil law, and the certainty and utility of the common law. For after all that has been said, I think it must be conceded that the two codes are in direct opposition on this subject. If this be made to appear, our course is obvious ; we must be bound by the common law rule. Under the Roman law, warranty is always implied, if not expressed, and unless restrained, the seller is bound to answer not only the price paid but damages ; and the value is considered not at the time of the sale, but at the time of the eviction, and each party runs the risk of what the value of the article may then be. (*Cooper's Justinian, notes p. 615.*)

Nor is there any distinction between real and personal property in the civil law. (*Cod. 8. 45, 6.*)

It must be confessed that some *nisi prius* cases have been decided in this state, in which the civil law rule prevailed, but they have never been considered as authority.

In the case of *Furman & Elmore*, (2 *Nott & McCord*,) decided by a full bench of judges at the winter sitting of 1812, in Charleston, it was unanimously decided that the

price paid, and interest, should be the measure of damages on eviction, and this it seems was always held by the bar. After the elaborate opinion of our respected brother *Brevard*, in the above case, and that of other distinguished judges in New-York, Pennsylvania, Massachusetts and Virginia, it would be a useless waste of time to trace this rule to its source, the feudal system. It is sufficient to refer to the authorities, (3 *Caines* 111. 4 *Johnson*, 1 and 18. 5 *Johnson*, 49. 4 *Dallas*, 414. 2 *Mass.* 433.— 3 *Mass.* 523.)

But it is said there is a difference between real and personal property in the application of the rule at common law. This is certainly a mistake. There never has been any such. If there had been, the ground of distinction could have been shown. It will be admitted that the analogy of cases for a failure to perform contracts, has afforded many plausible and specious arguments. But these are at once put down by shewing that the very purpose and object of the warranty at common law was to fix the extent of indemnity to which the seller intended to make himself or his heirs liable ; and perhaps it will be as well to refer to the late decisions in which this position is ably supported, as to go through the drudgery of referring to the old writers themselves. In fact it is a position which can not fail to present itself to the mind of a lawyer immediately as he reflects on the origin of warranties. In the case of *Bender & Franbeyn*, (4 *Dallas*, 443,) Mr. Justice *Tilghman*, after animadverting on some of the arguments of the counsel, which were calculated to show a distinction between the ancient warranty and a liability under the personal covenants, says, " the true reason therefore appears to be that the intention of the parties was so understood that the warranty should be limited to the value of the land at the time of executing the deed. "

This then would seem to put an end to all difficulty.— But to pursue this pretended distinction between the warranties of personal and those of real property, whether we look to the nature of the property, or to the rights and du-

ties of the parties in interest, I think it is demonstrable that the old rule of the common law is more peculiarly applicable to personal than to real property.

First then as to the nature of the property. There is a more frequent change of personal than of real property.—Consequently more and greater responsibilities would be incurred. There is oftentimes (as it relates to the particular description of property now in contest) a more certain increase in value; for it is the course of nature. And as it regards all kinds of personal property, it may be generally said, these are more the subjects of speculation than land.

Now as to the rights and duties of the parties, it sounds well to say if a man be deprived of a thousand dollars worth of property by a defect in his title, that he who sold should be compelled to make it up. But I ask if it is not increasing the calamities of life to make men answerable for that which the most consummate wisdom and incorruptible integrity can not guard against? Ought it not rather to be regarded as one of those incidents which are common to the lot of men—(and here it must be recollected that I am speaking of a case in which all parties are considered as free from fraud.)

Again, if there is room for blame, why not let it fall on the true owner who has not prosecuted his rights, and who it is to be supposed knows them or ought to know them, or has the means of knowing them much better than the honest *bona fide* seller who believed himself the true owner.

Again, personal property passes by delivery, and we have unfortunately adopted the civil law rule of implied warranty. A title to personal property can be proved by parol. In a word, the door is more open to fraud in regard to personal than real property. Any man may prove himself to be the owner of my property, and we daily witness recoveries, the justice of which are strongly suspected.—If the injustice is not actually believed, all the considerations then which can be deduced either from the nature of

the property or the rights and duties of the parties authorize me to conclude that there is no ground for extending the liability of a warrantor of personal property beyond those of the warrantor of real property ; and in this I am supported by high authority. Chief justice *Kent* says, in warranties on the sale of chattels, the law is the same as upon the sale of lands, and the buyer recovers back only the original price, and he refers to 3 *Caine's*, 113. See also 4 *Hall's American Law Journal*, 129, by which it is manifest that it has been the law of the land for years, and which is ably supported by *Luther Martin*.

No position is more universally true than that the certainty of a rule is of more importance than its justice ; for certainty is justice. And from the nature of things, no two cases can be found exactly alike in all respects. For all the practical purposes of life, the common law rule is to be preferred ; for there is nothing certainly in the rule of the civil law. And the consequences which result from it are so oppressive, that in many instances its advocates are obliged to acknowledge, that it ceases to be a rule, or at all events a rule of justice ; or to resort to expedients, to avoid its application. I would ask if it can be believed that a man who, 17 years ago, received £25, for a negro girl, could have imagined that he now would be called on to respond in damages to the amount of \$10,000? or if that rule can be considered as a rule of justice which shall compel him to do so? And this is not a fictitious case. Another case ; 200 acres of land were sold for \$200 : 40 acres were taken away by a title paramount, which forty acres were valued, at the time of trial, at \$600. Thus the purchaser would keep 160 acres of land, and pocket \$400. But I confess that I have thought it a slander on any system of jurisprudence to charge it with such monstrous absurdity ; and though I profess no learning in the civil law, I am decidedly of opinion that according to that code, the successful owner was made to pay for the improvements of his property ; which would reconcile a rule, which, without this redeeming provision, would be

actual injustice, and often be followed by utter ruin. If I am mistaken in this, I can only console myself with the reflection that I am not bound to follow civil law ; but that I have a better guide in the old common law, which is content with laying down certain general rules for the regulation of men, without aspiring to that perfection which is beyond the reach of human intellect.

Justices *Richardson, Huger, Nott, Johnson & Gantt*, concurred.

Noble & Wardlaw, for the motion.

Bowie, contra.

JAMES GIBSON vs. DAVID PEEBLES.

Receipts upon a note to take it out of the statute of limitations, if apparently fair, and not attended with circumstances calculated to excite suspicion that they were endorsed for the purpose of taking the case out of the statute, are *prima facie* evidence of payment, and are to be left to the jury.

Tried before Mr. Justice *Colcock*, Sumter Court, 'Spring Term, 1823.

THIS was an action on a note of hand for \$400, dated the 5th December, 1815, and payable on the first January following. On the back of the note there were two receipts, dated 14th May, 1817. The one for \$300, and the other for fifty dollars. To this, there was a plea of the statute of limitations.

Replication—payments made.

On the part of the defendant, it was urged that the receipt was not of itself sufficient to take the case out of the statute, that there must be some positive evidence of the payment ; and it was said the case had been decided by the case of executors of *Leonard Taylor vs. Roderick Mc-*

Donald, (1 *Con. Rep.* 178.) The plaintiff replied that the receipt, if apparently fair, and not attended with any circumstances which were calculated to create a suspicion that they were endorsed for the purpose of taking the case out of the operation of the statute, was *prima facie* evidence of payment, and must be rebutted by the defendant. That the case relied on, was one in which it is acknowledged that the receipt was a fictitious one, written by the defendant himself on the account, after it had been barred by the statute, and of course admitted of no doubt.

The presiding Judge submitted it to the jury as a fact for their consideration, with directions that if they were satisfied the payments had been made, they should find for the plaintiff; but if they believed as in the case cited, that they were endorsed for the purpose of taking the case out of the statute, they should find for the defendant. He expressed an opinion, however, that there was no ground on which they could found such a belief.

The jury found a verdict for the plaintiff for the amount of the balance of the note and interest; and a motion was now made for a new trial, on the grounds,

1st. Because a credit written on the back of a note is not sufficient evidence to take a case out of the statute of limitations without some other proof of payment.

2nd. Because the verdict was in other respects contrary to law and evidence.

Mr. Justice *Colcock* delivered the opinion of the court:

The decisions of the court on this subject, have been certainly misunderstood. It is the usual mode of conducting business in this country, for creditors to endorse receipts for all monies paid by their debtors on their vouchers, and this is most obviously for the benefit of the debtors. The receipt accompanies the evidence of the debt, and so long as the one is preserved, the other is secured. It is not said that such receipt is to be conclusive on the rights of the parties. It is a circumstance on which the presumption of payment may be raised, and it

is to be submitted to the jury. If there be nothing to induce a belief that the receipt is not a fair one, the jury ought, and no doubt will, always presume that the payment was made. If there be any such circumstances, they can be urged by the defendant, and if the payment was not made, there will be always some circumstances on which to raise a presumption of fraud. It is asked if the court will permit a man to make evidence for himself? this is *petitio principii*.

The defendant may as well ask, will the court permit a man to take advantage of his own wrong? Now the whole question is, was the payment made? If so, it is not permitting a man to make evidence for himself, but it would be permitting one to take advantage of his own wrong, to suffer the defendant to deny the payment. Here the note was for \$400, and the receipts bore date within two years after, and were for \$350, leaving a balance of principal, of only \$50; and on examination of the note, there is every appearance of fairness. The case relied on is the very opposite of this. The demand was on open account. It is not usual for receipts for partial payments to be made on the back of accounts. The receipt was for a small sum, and dated after the demand was barred. In a word, the Judge who decides the case, says expressly, "and to take it out of the statute, the plaintiff's testator himself, had given a credit for a payment which the defendant knew nothing of." In such a case, the plaintiff's argument, that a man ought not to be permitted to make evidence for himself, would well apply. The court are unanimously of opinion that the question was properly submitted to the jury.

The motion is therefore dismissed.

Carter, for the motion.

Holmes, contra.

JAMES M. LOWRY *vs.* WILLIAM M. BROOKS.

A business in which two are engaged, but having no mutual interest in the capital invested, and no stipulation for mutual loss, is not a co-partnership.

The statement of a *frivolous, with a sufficient*, consideration for a contract, will not vitiate the declaration, but the insufficient consideration may be stricken out.

It is sufficient that a declaration upon a special contract contains every material part of the contract, and almost every word.

Sumter district, Spring Term, 1823.

Tried before Mr. Justice *Colcock*.

THIS was an action to recover damages for the non performance of the following agreement :

STATEBURGH, July 28, 1818.

“ A memorandum of an agreement between *James M. Lowry* and *William M. Brooks*—Said *Brooks* does hereby acknowledge the receipt of an order to *Duke Goodman*, in Charleston, for three thousand weight of coffee, which said coffee he is to have conveyed to Kentucky, where said *Lowry* may think the best sales may be effected ; said coffee to be conveyed there immediately, entirely at the said *Brooks*' expense ; and said *Lowry* is to effect the sales or barter as he may think to the best advantage, and the intention is to load the waggon back with cotton bagging, which is to be conveyed at said *Brooks*' expense, and said *Lowry* does bind himself to give to the said *Brooks*, as compensation for the above services, one half of the net proceeds on the coffee out, and the load back. After said *Lowry* receives the amount of the costs of coffee, the balance on the sales of coffee and the load of bagging is to be equally divided.

Signed,

WM. M. BROOKS,

JAMES M. LOWRY.

The declaration stated that the defendant acknowledged the receipt of the order for three thousand weight of coffee, and in stating the consideration, says—“ In consi-

deration as well of the receipt by him, the said *William*, of the order aforesaid, (as that for the services he undertook to render) the said *James*, would equally divide with him the amount of sales of the coffee and load of bagging after the costs of the said coffee was subtracted."

And then proceeds in the latter part of the count to state, that he the said *William*, by virtue of the order aforesaid, on the agreement aforesaid, received from the said *Duke Goodman*, in twenty-one bags, the coffee aforesaid, of the value of \$795 43 1-2 cents."

On the trial below, a motion was made for a nonsuit :

1st. On the ground that the consideration was not correctly stated.

2ndly. That the agreement offered in evidence did not support the agreement declared on.

3d. That there is an omission of material allegations in the declaration of substantial parts of the special agreement offered in evidence ; which alleged omission was, that the defendant had not stated the receipt of the *three* thousand weight of coffee.

This motion was overruled, and the motion was now to reverse that decision, and for a nonsuit, on the ground :

1st. That the contract is a copartnership.

2d. That the consideration is not correctly stated.

3d. Because the contract stated was not proved.

And for a new trial :

1st. Because the evidence did not agree with the declaration.

2d. Because the damages are too high.

Mr. Justice *Colcock* delivered the opinion of the court :

On the first ground, little need be said. There is no one of the essential characteristics of a copartnership to be found in the contract. There was not a mutual interest in the capital, and no stipulation for mutual loss. It was a mere contract for hire to carry goods to a certain place, and bring back a return load.

On the second ground it is conceived that the consider-

ation is well stated, even admitting that the receipt of the order formed no part of the consideration, the insertion of it in the declaration, together with the true consideration, would not vitiate it. In 1 *Chitty*, (295-6,) it is laid down that the whole of the consideration of the defendant's contract must be stated, and where a part of a consideration, or one of several considerations is frivolous and void, it is sufficient to notice only the valid consideration; though if stated, it will not vitiate the declaration.

The third ground cannot avail the defendant, for it appears on examination that the declaration contains every material part, and almost every word of the contract.

The fact alluded to in the first ground for a new trial, which it is conceived was not sufficiently proved, was, that three thousand weight of coffee had been received.—Now, the letter introduced did not say in so many words that 3000 weight had been received; but it is said the order had been presented, and “the coffee received,” which can admit of no other construction than that 3000 weight had been received, the order being for that quantity.

On the last ground, as to damages, it is clear from the testimony adduced, that a loss to a greater amount than the sum found by the verdict had been sustained by the plaintiff independent of the loss of his coffee.

The motion is dismissed.

Justices *Richardson, Huger, Nott and Johnson*, concurred.

Miller, for the motion.

Huntington, contra.

SAMUEL MCCLURE vs. MOSES MOUNCE.

When mortgaged land is sold without a regular foreclosure, either at law or equity, a purchaser buys no other interest than an equity of redemption: And where it had been sold under an execution

recovered upon the bond upon which the mortgage was given, but the money applied to satisfy an older judgment, the court granted leave upon suggestion, to have the land resold to satisfy the mortgage.

Tried before Mr. Justice *Nott*, Richland district, Spring Term, 1823.

The defendant *Mounce*, was indebted to the plaintiff *McClure*, by bond, on which the plaintiff got judgment, and issued execution. The sheriff levied on *Mounce's* land ; sold it, and *Kinsler* became the purchaser at \$200. The sheriff was ruled to pay the money to the plaintiff, and shewed for cause, that he had an older execution against *Mounce* in his office, belonging to one *Smith*. The plaintiff then produced a mortgage of the same lands, given to secure the payment of his bond of older date than *Smith's* execution.

The court refused to recognize his right as mortgagee or to order the money to be paid to him. The plaintiff then filed his suggestion of the mortgage, according to the provisions of the act, making *Smith*, *Kinsler* and *Mounce* parties, by notice.

The plaintiff moved to reverse the decision, and that the order might be granted, because the sheriff sold only *Mounce's* equity of redemption, and if the order was not granted, that the money raised by the sheriff should be paid to the plaintiff, *McClure*.

Mr. Justice *Colcock* delivered the opinion of the court :

This case can admit of no doubt after the decision of the case *Ex parte, City Sheriff*, (1 *McCord*, 399.) The abstract question is, when mortgaged land is sold without a regular foreclosure, either at law or in equity, what interest passes to the purchaser ? And the case above mentioned, furnishes a direct answer.—The equity of redemption only is sold. It is said this case differs from the case of the *City Sheriff* in this, that here the plaintiff's execution was lodged, and he must be considered as ordering the land to be sold ; and that in that case, the mortgagee

was the purchaser, and here the land was bought by a stranger. The latter point of difference does exist, but cannot vary the principle. As to the first, I am not satisfied that it does exist, but if it do, the lodgment of the plaintiff's execution in the sheriff's office, cannot be considered as a direction to the sheriff to sell this particular piece of property, for the execution is general in its terms. It issues against all the defendant's property, both real and personal. If, however, he had given a written direction to the sheriff to sell this plantation, it could not have altered the case. The fee in mortgaged premises cannot be sold except by foreclosure of the mortgage in Equity or in the Court of Common Law, agreeably to the provisions of the act of assembly. Can it be contended that there is any right existing in a creditor, to divest his debtor of this legal protection which the law has placed around his property? I presume not. He has no reason to believe that any thing is sold, but the equity of redemption, until he is called on in some court, to shew cause why that should not be done. If he had been so called on, may he not have paid the debt and discharged the lien? It was also urged that the purchaser, by this mode of proceeding, is taken in. He thought he was buying the fee. This is the common lot of purchasers at sheriff's sales. Suppose a sheriff sells a tract of land in which a defendant has only a life estate, can it be said the whole interest should pass because the purchaser thought he was buying it?

But in this case, there were means offered, to the purchaser by which he could have known that the fee was not sold, or at all events been put upon the enquiry, viz : The mortgage was recorded.

The motion to foreclose is granted.

Justices *Richardson* and *Huger*, concurred.

Mr. Justice *Gantt* :

I dissent expressly from the opinion in this case. The sale of the land was at the instance of the mortgagee, and

thereby the equity of redemption was purchased, and a title in fee secured to the purchaser. It was competent for the mortgagee to avail himself of the benefit of the specific lien created by the mortgage, or waive it and proceed under his execution, to sell the land at Common Law. He chose the latter, and consequently waived his right under the mortgage. It being therefore the act of the mortgagee himself, by which the purchaser who paid the full value of the land, and without notice at the time of sale as to the interest sold, was imposed upon, he cannot set up his right under the mortgage to defeat the sale. It was the expectation of the mortgagee that the fee was to be sold, and it was only after he found there was an older execution that he repented ; which was too late.

De Saussure, for the motion.

McCord & Preston, contra.

LEWIS HARRELL vs. ELIAS KELLY.

Where a person obtains money fraudulently, the plaintiff is not barred if he commence his action within four years after the fraud is discovered.

Darlington district, Spring Term, 1823.—Tried before Mr. Justice Colcock.

THIS was an action to recover the sum of one hundred dollars, which it was alleged the defendant had received from the sheriff of the district for the plaintiff, and had never paid it over. The evidence was that the defendant on being applied to for the money, at first denied that he had ever received it ; but upon being told that the sheriff had his receipt, he said he had forgotten it, but was sure if he ever received it he had paid it over. The sheriff then produced the receipt, and stated, that in settling with the

plaintiff about 18 months before this action was brought, the plaintiff denied he ever authorized the receipt of the money, and refused to allow the same ; but it was insisted on by him and acquiesced in. That the plaintiff had frequently sent for money in that way. The receipt was dated more than four years before the action was commenced.

The defendant pleaded the statute of limitations, and the plaintiff relied on two grounds to prevent the operation of the statute :

1st. That the money had been received fraudulently without his knowledge or consent, and

2ndly. That if it could be presumed that he consented, that it should then be considered as a trust.

The defendant's counsel contended that there was in fact no evidence of fraud. That the defendant's character stood fair, and that the plaintiff was in the habit of sending for money in that way, and that the jury ought to presume that if the money had been received, that it was paid over. That nothing was more common than sending for money by a friend without any written order, and receiving it without giving any receipt. Nor was it extraordinary that he should have forgotten such a circumstance after the lapse of four years. But that at all events he was entitled to the benefit of the act ; for the doctrine contended for by the plaintiff's counsel was a doctrine of equity and not of law.

The presiding judge charged the jury that if they thought the money had been fraudulently obtained they should find for the plaintiff. That the doctrine of trusts had no application to the case, and that it was his opinion that on the facts, they were authorized to find for the defendant.

The jury, however, found a verdict for the plaintiff, and a motion was now made to set aside the verdict, and for a new trial, on the ground that there was no evidence to take the case out of the statute.

Mr. Justice *Colcock* delivered the opinion of the court :

The jury having found a verdict for the plaintiff in this case, this court cannot interfere, although they may think that the verdict ought to have been for the defendant on the facts.

The finding determines that the money was fraudulently obtained, and in such case, if the plaintiff prosecute his claim within four years from the time the fraud is discovered, the case is not barred. It would be a violation of every moral principle to permit a man thus to reap the fruits of his own wrong. The statute was not intended to work such mischief ; it was meant to protect honest men from being compelled to pay their debts a second time ; and it is allowed to operate on the supposition that the defendant is paid. Nor is this doctrine confined to the Court of Equity alone. In 4 *Bacon's abr.* 476, it is said, " at law as well as in equity, if a plaintiff is prevented from obtaining a knowledge that he has a cause of action by a fraudulent concealment on the part of the defendant, he will not be barred by the statute if he commence his action within six years after the fraud is discovered " And this is supported by the case of *Bree & Holbech*, (*Dougllass*, 655,) and by the case of the *Massachusetts Turnpike Corporation vs. Field*, (*3 Mass. T. Rep.* 201.)

The motion is dismissed.

Justices *Nott*, *Richardson* and *Johnson*, concurred.

Mr. Justice *Gantt* dissented.

Miller, for the motion.

Evans, contra.

S. NICHOLSON & Co. vs. JOHN WITHERS.

A merchant, plaintiff, can not be examined by commission, to prove his own account by reference to his books, and not by producing them in court ; but a disinterested witness who made the entries may be so examined without the production of the books ; for the entries in the

book are mere memoranda, to which he may refer to refresh his memory.

By refreshing his memory, is not to be understood that the memoranda must bring to his recollection that every article was actually delivered. They can only inform him that he made the entries, and enable him, therefore, to say that he delivered the articles at the time.

THIS was an action of assumpsit on an open account. Tried before Mr. Justice *Nott*, Lexington, Spring Term, 1823. The plaintiff was a merchant living in Charleston, and, pursuant to the provisions of the act of 1816, authorizing persons who live more than a hundred miles from the court where the cause is to be tried, had produced the witness who made the entries to be examined upon commission, to prove the account. Upon this evidence being offered, an objection was made to its being read without the production of the book. This objection was overruled and the plaintiff obtained a verdict. This was a motion for a new trial, on the ground that incompetent evidence had been permitted to go to the jury.

Mr. Justice *Nott* delivered the opinion of the court:

If the oath of the plaintiff himself, taken in this way had been offered, I think it could not have been received ; because the books in such case, are the principal evidence, and the oath of the party only suppletory. And the evidence of the books depends principally upon the fairness and regularity with which they have been kept. It is necessary, therefore, that they should be produced for the inspection of the court. But when the account is proved by a disinterested witness, the entries in the books are nothing more than memoranda by which to refresh his memory. By refreshing his memory, is not to be understood that the memoranda must bring to his recollection, that every article was actually delivered. They can only inform him that he made the entries, and enable him, therefore, to say that he delivered the articles at the time. And in this case, the witness not only swears that he made the entries, but that according to the best of his re-

collection, he delivered the goods. Also suppose they had been articles delivered by a farmer, such as corn, flour, pork, cotton, &c. might they not have been proved in this way? And a merchants accounts may be proved according to the rules of the common law as well as any other, when he is prepared with common law testimony, for that purpose. The case of *Die dem Church vs. Perkins & al.* (3 D. & E. 751,) does not militate against the rule here laid down. There the witness came into court with the copy of a memorandum in his hand, and he could only swear to facts from the copy which he had. But the court said he must refer to the original and not to a copy, unless he could recollect and swear from memory independent of the memorandum. The witness in the present case, had the books before him, and proved the account from the original entries made with his own hand and then immediately under his eye.

The motion is therefore refused.

Justices *Colcock, Richardson, Huger* and *Johnson*, concurred.

Stark, for the motion.

McCord & Preston, contra.



ROBERT LATTA vs. The Administrators of WILLIAM SURGINER.

Where a suit abates by the death of one of the parties, each pays his own costs.

Columbia, Spring Term, 1823.—Tried before Mr. Justice *Nott*.

THE plaintiff had commenced an action against the defendant's intestate in his life time, which abated by his death. This action was then commenced against his ad-

ministrators, and a count was introduced into the declaration for the costs of the former action. The presiding judge held, that the plaintiff was not entitled to recover on that count. The plaintiff however was permitted to take a verdict, subject to the opinion of the court on that point. This was a motion to reverse the opinion of the court below.

Mr. Justice *Nott* delivered the opinion of the court :

The question in this case is, whether an administrator is liable to pay the costs of a suit which was brought against the intestate in his life time, and abated by his death. The only authority in favor of such a position which has been produced or that I can find, is a *dictum* of Lord *Coke*, (2 *Inst.* 288;) that if a writ abate by the act of God, and the plaintiff purchase a new one by journeys accounts, he shall have the costs of the first writ, and the proceedings thereon; otherwise it is if the first writ abate through the default of the plaintiff. And it is laid down in *Ballantine On Limitations* that if a defendant dies, then the plaintiff may purchase a writ by journeys accounts. This old method of proceeding by journeys accounts appears long ago to have fallen into disuse. I do not know that I understand enough of it to be able to give a correct opinion of its application to this question. The best account that I have seen of it is given by chief justice *Treby* in the case of *Kinsey vs. Heywood*, (1 *Lord Raymond*, 433.) He says that the Chancery being a moveable court, and following the King's court, and the writs being to be purchased out of the said court, the party who purchased the second writ ought to have applied to the King's court as hastily as the distance of the place would allow, accounting twenty miles for every day; and for this reason, he was *to shew in the second writ* that he had purchased his second writ as hastily as he could, accounting the days journies he had to the King's court. It appears by this account that he ought to have set out in his second writ, that it was brought by journeys accounts

in order to shew that it was a continuance of the former process. And in the case in Lord *Reymond*, chief justice *Treby* says, "there is nothing of journeys accounts before us ; for the second writ is not said to be brought *per dietas computatas*, as all the precedents are." It would seem therefore that the plaintiff cannot recover in this case for want of that formality. But without relying at all on the form of the proceedings, I do not think that the costs ought to be allowed. It has always been considered in this state that where a suit abates by the death of one of the parties, each should pay his own costs; and a mere *dictum* of equivocal import from any old author, even from Lord *Coke*, ought not to influence us to innovate upon a rule so long established by practice.

The motion therefore must be refused.

Justices *Colcock*, *Richardson*, *Johnson*, *Huger* and *Gantt*, concurred.

Gregg, for the motion.

De Saussure, contra.

ASHLEY vs. REEVES.

When property is sold at a reduced price on account of a known defect, but paid for as sound in other respects, the purchaser may still claim a deduction, under an implied warranty, for any other defects. An action for *money had and received* on account of the failure of an article purchased, can not be maintained until the property has been returned or tendered back ; but to support an action on the warranty, it is not necessary that the property should either be tendered or returned. And this rule relates as well to *implied* as to *express* warranties.

And in declaring on an *implied* warranty, the declaration is the same as upon an *express* warranty.

'Tis not every *special* assumpsit, that is an *express* assumpsit ; for a *special* promise may as well arise by implication of law as by the *express* promise of the party.

Tried before Mr. Justice *Nott*, Newberry, Spring Term,
1823.

THIS was an action of assumpsit on a note of hand, for five hundred dollars, which had been given for a negro fellow. The defence set up, was that the negro was unsound. The witnesses all agreed that the negro was lame, that there was a large scar on his hip or thigh. Whether that was the cause of his lameness or not, they did not know. One witness who was present at the contract, said that the defendant was aware of the lameness when he purchased, and said that if the plaintiff would warrant him sound in every other respect except the lameness in the leg, he would take him. He thought the negro sold at a reduced price on account of his lameness. Such a negro, if sound, would have been worth at that time, from eight hundred to a thousand dollars. One witness said he appeared disordered in the breast. The breast bone appeared sunk in. Another witness said he appeared to be injured in the arms. Several of the witnesses said he complained often ; was able to do but little work, and they thought him entirely worthless. It appeared that four hundred dollars had been paid on the note. But that it had been paid by the defendant's wife when he was from home, and that he expressed his dissatisfaction at it when he returned.

It was contended on the part of the plaintiff, that the defendant was not entitled to this defence, as he had not tendered back the property.

The cause was tried at Newberry, Spring Term, 1823.

The presiding Judge instructed the jury that it was not necessary to return the negro or to tender him back. And that if they were satisfied that he was sound or that he answered the description given of him at the time of the sale, they ought to find for the plaintiff, otherwise for the defendant.

The jury found for the defendant.

And this was a motion for a new trial on two grounds,

1st. Because the verdict was contrary to evidence.

2nd. On the ground of misdirection of the court.

Mr. Justice *Nott* delivered the opinion of the court:

This case does not essentially differ from most of the cases of this description with which our dockets are crowded. The defendant agreed to take the negro, provided the plaintiff would warrant him sound in all respects, except the lameness in one leg. The silence of the plaintiff seemed to imply an acquiescence in those terms, and so the defendant certainly understood it. And although an implied warranty usually arises from the party's having paid the full value of the property, and although this negro was sold at a reduced price, yet the reduction was for the lameness in the leg only, and the plaintiff received a full price for him as sound in all other respects. If, therefore, he was unsound in any other respect, the plaintiff was liable. One witness said that he appeared disordered in the breast. Another, that he appeared to have some defect in the arms. This testimony to be sure, did not appear to me to be very satisfactory. Nor did I consider the witness very competent to determine the questions. Yet these were questions for the consideration of the jury. Besides, several of the witnesses said he often complained, appeared able to do but very little work, and they thought him entirely worthless. This testimony also may appear rather too general and unsatisfactory. Yet, perhaps a negro may be so totally decayed throughout his whole system, that the unsoundness may appear manifest even to a common observer, who could not trace it to any particular cause nor be able to lay his finger on the spot where the disease was seated. And although I would always recommend to a jury to be cautious how they found a verdict on such evidence, I am not prepared to say they may not do so, or that their verdict ought not to be supported.

There is one point of law made in this case, which I thought had long ago been settled in this state, but respecting which, I find that some diversity of opinion still ex-

ists, to wit : That the defendant could not avail himself of this defence without having returned the property to the plaintiff or tendered it to him. I have always understood the rule to be, that whenever a person can maintain an action as plaintiff, he may avail himself of the same matter by way of defence when he becomes defendant, provided the defence be a subject matter of set off. The question then is, could this defendant have maintained an action on the warranty for the unsoundness of this negro ? The distinction which has always been made in this state, is that an action for *money had and received* cannot be maintained until the property has been returned or tendered back. And for the most obvious reason. The purchaser cannot keep the property and recover the money also. It is not until the contract is rescinded, as far as it is in the power of one party to rescind it, that the other is considered as having received the money to his use. So in England, it is held that an action for money had and received, is not the proper action to try a warranty ; but the action must be brought on the warranty itself. But it is contended that this relates to express warranties only, and that an implied warranty does not furnish a ground for a special assumpsit. I apprehend, however, that this is a mistake. In declaring on a warranty, the form of the declaration is precisely the same, whether the warranty be express or implied. It appears to me that the mistake has arisen from confounding an *express* assumpsit with a *special* assumpsit, and considering them as synonymous terms. But a *special* promise is not necessarily an *express* promise. It may as well arise by implication of law as by the *express* promise of the party. Thus, if a person enter into an *express* contract to build one a house, the same implies a promise that he will do it in a workmanlike manner. And if he do the work and yet fail to do it well, he will be liable to a *special* action on the case, for that breach of promise. So, if one man sell another a negro for a full price, the law implies a warranty of soundness, for a breach of which he may have a special assump-

sit. But he cannot have a general indebitatus assumpsit, because he owes him nothing. If the property is unsound, the warranty is broken. If the contract is violated on one side, it is dissolved on the other, and he may return the property or tender it back. And then he may maintain an action of indebitatus assumpsit for money had and received. The objection, therefore, that the defendant had not tendered back the property, will not deprive him of the benefit of his defence, and the motion must be dismissed.

Justices *Colcock, Richardson, Gantt* and *Huger*, concurred.

Stark, for the motion.

• *O'Neal & Johnson*, contra.

THOMAS FURNAN vs. SAMUEL HARMAN.

After verdict the court will not interfere because security for costs had not been entered in pursuance of an order of court. The whole object of security is to save the defendant from harm, and when the claim of the plaintiff is substantiated by a verdict of the jury, it is sufficient to show that the defendant could not be injured.

If the third day of grace happen on a Sunday, the demand may be made on the second.

Newberry, Spring Term, 1823.—Tried before Mr. Justice *Nott*.

WHEN this cause was called for trial, a motion was made for a nonsuit, on the ground that it did not appear that security for costs had been given within the time prescribed by an order of court previously made for that purpose. The motion was overruled, on the ground that the question had been decided at a former court.

When the cause was opened, it appeared that the action (which was on a promissory note,) had been commenced on the second day of grace, the third having fallen on Sunday.

The motion for a nonsuit was renewed, on the ground that the action was prematurely brought.

That motion was also overruled.

The plaintiff obtained a verdict.

This was a motion to set aside that verdict, and for a nonsuit, on the grounds above stated.

Mr. Justice *Nott* delivered the opinion of the court:

When this case was formerly before the court, it was determined that the order of court had been complied with. That would seem to imply not only that it had been done in a proper manner, but that it had been done within the time prescribed. But, supposing that question to have been passed over on the former occasion, the court would not presume that it had been done in time. But even if the fact were otherwise, it would furnish no ground for setting aside the verdict. There is no law in this state requiring persons residing out of the state to give security for the costs when they bring an action in our courts. It is merely a practice introduced by the court for the security of the defendant; and after a verdict has been obtained, the court will not set it aside, even if no security has been given. The object of it ceases as soon as it is discovered that the plaintiff's case has merits, and a verdict has been obtained.

The second question appears to have been settled as long ago as the time of Lord *Holt*, and probably long before. In 1 Lord *Raymond*, 743, (*Tassel & Lee vs. Lewis*,) it is laid down that if it happens that the last day of the said three days (of grace) is a Sunday or great holiday, as Christmas, &c. upon which no money is used to be paid, then the party ought to demand the money on the second day. The same doctrine is laid down in all the modern authorities. (*Chitty On Bills*, 208. 13 *Johnson*, 471, *Johnson vs. Haytil and Mathews*. 2 *Caine's*, 343, *Jackson vs. Richard*.) Why three days of grace should be allowed on a promissory note in which a day of payment is fixed, it is now too late to enquire. But I have

never been able to discover any good reason for it. It cannot be that the party might be prepared to meet it ; for the contract itself prescribes the time he shall have for that purpose, and he ought to be prepared by the day. However we have adopted the rule, and must now be bound by it. But we have adopted it with all its limitations and exceptions ; one of which is, that if the third day fall on Sunday, the demand may be made on the second.

The motion must therefore be dismissed.

Justices *Colcock, Gantt, Richardson, Huger and Johnson*, concurred.

Caldwell, for the motion.

Bauskett, contra.

THE STATE vs. JOHN FAULKENER.

▲ *still house*, or distillery, is such an "out house" as is contemplated by the Act of Assembly of 1816, prohibiting gaming.

Indictment for Gaming.—Tried before Mr. Justice *Nott*, at Edgefield, Spring Term, 1823.

THE indictment charged the defendant with having committed the act in a certain out house, used as a distillery. And this was a motion in arrest of judgment, on the ground that a distillery was not such an out house as was contemplated by the act against gaming.

Mr. Justice *Nott* delivered the opinion of the court :

The defendant in this case has been indicted under the act of 1816, the title of which is, "an Act, the more effectually to prevent the pernicious practice of gaming." The object of the act is therefore expressed in the title ; and the reason why it is considered expedient to prohibit this

practice, is set forth in the preamble of the act. It is because it is often attended with quarrels and controversies ; the impoverishment of many people ; corruption of the morals and manners of youth, &c. Perhaps by looking at the evil here complained of, and the remedy intended to be applied, we should, without any difficulty, be lead to the true construction of this act. But I nevertheless think that our inquiry will be facilitated by a reference to the act of 1802, which was the first act creating this offence. The title and preamble of that act are in substance, and nearly in words, the same as that of 1816. The enacting clause makes it penal in any person to “ play at any tavern, inn, store for the retailing of any spirituous liquors, or in any other public house, or in any street, high way, or in any open wood, race field, or open place at any game or games, &c.” In this clause, houses of a particular description are enumerated, which necessarily excludes all others from the operation of the act. The mischief therefore complained of as arising under that act was that the penalty might be eluded, and the object of the Legislature entirely defeated by going into any out-house, whether attached to the principal house or elsewhere. To remedy that evil, the act of 1816, after repeating that part of the former act, superadds the following words—“any house used as a place of gaming, or in any barn, kitchen, stable, or other out-house.” Now what is the meaning of the words “out house?” Taken literally, they must mean any house separate and apart from the principal or mansion house.

There is nothing in the act to limit their meaning to the out houses appurtenant to the mansion house. The policy of the law should lead us to extend it to out houses of every description. For its professed object is “to prevent the pernicious practice of gaming.” With that view, it is made to embrace high ways, open fields and race paths, kitchens, barns, stables and every other *out house*. It would have been difficult to have made use of words more comprehensive. Both, the letter and the

spirit of the act, therefore, seem to lead to the same construction. If gaming has a tendency to lead to quarrels and controversies, and to the corruption of morals, &c. when carried on in an open field, that tendency cannot be much lessened by carrying it on at a still house. And although penal laws are not to be extended by construction, yet the policy of the law is to be regarded. In this case, however, the court can discover no inconsistency between the letter and policy of the law. They both tend to the same object, and the motion, therefore, must be dismissed.

Justices *Gantt*, *Richardson*, *Huger* & *Johnson*, concurred.

Butler, for the motion.

Jeter, Sol. contra.



JOHN TALBOT vs. The Ex'rs of JOHN C. MASON.

Whether the number of acres or the metes and bounds, constitute an essential part of the contract, (in a conveyance of land,) or are intended as mere description, must depend upon all the circumstances.

And when a certain number of acres are sold, with a description only to fix its locality, and its extent not exhibited by any visible and known marks, and only to be ascertained and marked out by a survey, then it will be considered as a sale of so many acres, and not more or less.

Edgefield, Spring Term, 1823.—Tried before Mr. Justice *Nott*.

THIS was an action on a bond, with a condition to make titles to a certain tract of land. The land to be conveyed was described as “situate near the village of Cambridge, in Abbeville and Edgefield districts, on *Henley's* creek, waters of Saluda river, containing three hundred and sixty acres, bounded on lands belonging to *James McCrachen*, *William Williams*, *Callet Conner*, and

others." On a re-survey, it was found to contain only three hundred and forty-three acres, leaving a deficiency of seventeen acres. The land was admitted to be of considerable value ; and the only question was, whether the plaintiff was entitled to recover for the value of the seventeen acres, of which the tract upon a re-survey fell short ?

The cause was tried at Edgefield, Spring Term, 1823, before Mr. Justice *Nott*, who instructed the jury that the plaintiff was entitled to recover, and they found a verdict accordingly.

This was a motion for a new trial, on the ground of misdirection in the presiding judge.

Mr. Justice *Nott* delivered the opinion of the court :

In all deeds or covenants for the conveyance of land, it is necessary that they should be identified in some way or other. They may be so described by metes and bounds as to render the number of acres mentioned unworthy of consideration. As in the case of *Briggs & Peay*, (2 *Nott & McCord*, 184) where the land was sold with reference to a plat which was present, and delivered over to the purchaser with the deed. There it was held that he was entitled to hold all the land contained within the lines of the plat referred to, although it amounted to a great deal more than the deed called for. Sometimes the number of acres will govern ; as when a person sells an hundred acres of land to be taken off of the northern or southern part of a certain tract of land, (describing it,) containing any greater number of acres. Sometimes a farm may be known by a particular name or its situation. As if a person should sell his farm called the Elysian-fields, or his farm adjoining Columbia. In such cases, the entire farm will pass, although it contain a greater number of acres than is mentioned in the deed, provided the metes and bounds are sufficiently known without being particularly described ; (*Jackson vs. Barrenger*, 15 *Johnson*, 471.) So that whether the number of acres or the metes and bounds constitute an essential part of the contract, or are

intended as mere description, must depend upon all these circumstances. In the case under consideration, the defendant undertakes to convey a tract of land containing three hundred and sixty acres. The land is not so described by metes and bounds as to furnish any data by which the number of acres might be known. It is described as joining the land of other persons merely for the purpose of fixing its locality. Its extent is not exhibited by any visible and known marks by which its identity can be established by ordinary evidence *aliunde*. It can be ascertained only by actual survey. Upon the common principle, therefore, that a deed must always be construed most strongly against the maker of it, the plaintiff is entitled to recover to the whole extent of this covenant.— Suppose upon a survey the land had been found to contain only twenty acres, could it have been contended that the defendant had only sold the tract for more or less, and that his contract had been fulfilled? The law does not indeed regard trifles; and if the deficiency had consisted of a mere fragment, the action could not have been sustained. Even seventeen acres out of a large tract of pine barren land might be considered as beneath the notice of the law. But of good land, near a village, it is of no inconsiderable value. In a town, a foot of land may be of great value. This court is satisfied with the instructions given to the jury in the court below, and the motion must therefore be dismissed.

Justices *Colcock, Gantt, Richardson, Huger* and *Johnson*, concurred.

Whitner, for the motion.

Mayson, contra.

THOMAS W. FURNAN vs. SAMUEL HARMAN.

Where the plaintiff is ordered to give security for costs, being resident out of the state, it is sufficient to enter such security on the back of the declaration.

Newberry July Term, 1822.—Motion to set aside nonsuit. Tried before Mr. Justice *Gantt*.

AT October Term, and after the cause was placed on the issue docket, an order was obtained at the instance of the defendant, that the plaintiff who resided without the limits of this state should give security for the costs of this case, on or before the next term, or be nonsuited.

Security for costs was given in pursuance of the order, but the obligation was taken on the declaration which was in the possession of the plaintiff's attorney instead of being entered in the clerk's office.

At the special court at July Term, 1822, a nonsuit was ordered, on the ground that security for costs had not been regularly entered and filed in the clerk's office.

The plaintiff moved this court to set aside the order of nonsuit, and for leave to reinstate his case on the docket, on the grounds :

1st. That the order for security for costs was unconstitutional, and therefore void.

2d. That entering security on the declaration, was perfectly regular and consistent with the practice of this court.

Mr. Justice *Colcock* delivered the opinion of the court :

The court are of opinion that the entry on the back of the record was a sufficient compliance with the order made for security for costs, and that the nonsuit should not have been ordered. If there was surprize, it would have been a good ground for continuance. The first ground was abandoned.

The motion is granted.

Justices *Johnson*, *Huger*, *Richardson* and *Nott*, concurred.

Burskett, for the motion.

Caldwell, contra.

CONSTITUTIONAL COURT

OF

SOUTH-CAROLINA, MAY TERM, 1823.—CHARLESTON.

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	RICHARD GANTT,
ABRAHAM NOTT,	DAVID JOHNSON,
CHARLES J. COLCOCK,	JOHN S. RICHARDSON,
DANIEL ELLIOTT HUGER.	

WINBORN LAWTON *vs.* WILLIAM RIVERS.

A right of way over another's land may arise in three ways : 1st. From necessity : 2d. By grant : 3d. By prescription.

To establish such necessity, nothing is required but to show the necessity. If the necessity has existed but for a day, the claim is as well founded as where it has existed for half a century. But there must be an actual necessity, and not a mere inconvenience to entitle a person to such right.

Where a person, living on an island, had a navigable water course from his own door to the high way, of no greater distance than to pass through his neighbor's field, the court *held*, it was not such necessity as gave him a right of way over the field.

Three things are necessary to establish a right by prescription :—1st. Continued and uninterrupted use and occupation or enjoyment : 2d. The identity of the thing enjoyed : and 3d. That it should be adverse from the right of some other person.

Every immaterial change in a road is not a destruction of its identity ; but it must depend upon the situation of the country.

Tried before Mr. Justice *Richardson*, at Charleston, January Term, 1823.

THIS was an action for obstructing a right of way.—The plaintiff was the owner of Long Island, which is separated from Goat Island by a bold navigable stream or

inlet, called Long Island River. Goat Island is connected at ebb tide with James' Island, by what the witnesses called a hard marsh, which is covered with water at every flood tide. The defendant owns that part of James' Island which lies adjacent to Goat Island, where it is connected with this hard marsh. A Mrs. *Stent* formerly lived at the plantation where the defendant now lived. From the defendant's plantation is a neighborhood road, leading southwardly to a public high way. A little south of the defendant's house, is a path turning off from this neighborhood road and leading on to the north through his plantation to the hard marsh, and from thence through Goat Island to the River opposite Long Island. It appeared in evidence, that about twenty two or three years before the bringing of this action, one *Littlejohn* owned and planted Long Island. That he as well as all other persons having occasion to go to Long Island or Goat Island, was in the habit of travelling this path through Mrs. *Stent's* (now the defendant's) plantation along the hard marsh, and through Goat Island to Long Island River. Sometimes Mrs. *Stent* would fence up the path, and then persons travelling that way, if on foot, would go through the field; if on horseback, would "pick their way," (to use the expression of the witnesses) round the fence as well as they could. There was always some passage through by which they could pass; but the path always changed with the changing of the field. The plaintiff's father bought Long Island of *Littlejohn*. It was not very satisfactorily proved how long *Littlejohn* continued to plant the Island, nor what interval of time, if any, elapsed after he left it, until the plaintiff's father took possession; nor whether the use of the road had been continued and uninterrupted by the plaintiff and his father since that time. The distance by water to the main road is about the same as by land.—The defendant purchased Mrs. *Stent's* land in 1807, and had erected a fence across this path, which was the obstruction complained of.

The jury found a verdict for the plaintiff, and this was

a motion for a new trial on several grounds, but principally, because the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the court :

Cases of this description have not frequently occurred in this state. The law, I think, has not therefore been well understood, and in the cases which we have had before us, has not been laid down with that precision which the importance of the subject requires. The cases appear to be multiplying ; and, from the prospect before us, will not in future be unfrequent. It has therefore become important that the general principles by which they are to be governed should be known, and more distinctly expressed than they have been hitherto. A right of way may arise in three ways :

First, from necessity.

Secondly, by grant.

And thirdly, by prescription. (*2 Blackstone's Com.* 35-6. *3 Comyn's Digest*, 56. *1 Saunders*, 323 a.)

A right of way from necessity, is where a man having several tracts of land, sells one which is surrounded by the others, having no way of ingress and egress but through one of those reserved. So, even if he reserve the tract in the middle for himself, he is entitled to a way through necessity. (*Perman vs. Wead*, *2 Massachusetts Rep.* 203. *6 Jacob's Law Dictionary*, 415. *Howton vs. Frearson*, *8 Term Rep.* 50.) So, where a part of a man's land is taken from him by operation of law, as under a sale by execution, leaving him no way of egress, the law will allow him one from necessity ; (*Perman vs. Wead*, *2 Massachusetts Rep.* 208.) It is indeed, said, that what is usually called a right of way from necessity, is by grant ; because where a thing is granted, the law implies a grant of every thing necessary to the enjoyment of it ; (*1 Saunders*, 323, *Pomfrit vs. Ricroft*. *5 Rep.* 12 *Saunders's case*. *Howton vs. Frearson*, *8 Term Rep.* 50. *6 Jacob's Law Dictionary*, 465.) But still, I think, the three-fold distinction above mentioned, may be

preserved, because it is from the necessity of the thing that the law implies a grant. To establish such right, nothing is required but to show the necessity. Neither time nor occupation are necessary. If the necessity has existed but for a day, the claim is as well founded as where it has existed for half a century ; and although the right may never have been enjoyed, yet its existence will be co-extensive with the necessity. But there must be an actual necessity and not a mere inconvenience to entitle a person to such right. One man is not required to subject himself to an inconvenience, and much less to an actual loss, for the accommodation of another. I do not mean to say that there must be an absolute and irresistible necessity ; an inconvenience may be so great as to amount to that kind of necessity which the law requires, and it is difficult and perhaps impossible to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity. It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable water course from his door to the public road or high way, by which the distance is not greater than by land ; and although there may be some inconvenience in being obliged always to go by water when he visits his plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbour to keep up a lane through his plantation for his accommodation ; and even if it were greater, it was one of which he was aware when he purchased, (or those under whom he claimed,) and may, therefore, be considered of his own creation. But if an island has certain inconveniences, it has its conveniences also. The convenience of transporting produce to market by water is not inconsiderable ; it furnishes an exemption from bad neighbours, from the depredations of servants, horses, cattle, &c. which constitute a great portion of the "miseries of human life." The plaintiff, therefore, is not entitled to a right of way over the defendant's land from necessity, (6 *Jacob's L. Dict.* 415.)

The second method of claiming a right of way is by grant ; that is, by special permission of the owner of the soil. Such right must be established by the production of the grant itself, or, if lost or destroyed, by secondary proof, according to the ordinary rules of evidence. This, like the right by necessity, “ derives no strength from time or occupation.” A grant of yesterday is of equal validity to one of a century past ; and even though the way may never have been enjoyed, the grant is conclusive of the right. In this case, no grant was pretended ; no proof of one was offered. The plaintiff, therefore, was not entitled to recover on that ground.

3rd. The third and last method of entitling a person to a right of way is by prescription. A title by prescription differs from a title by grant in this, that use and occupation are substituted in the place of a grant ; for prescription always presupposes a grant to have existed, and to be lost or destroyed by time or accident, (*5 Jacob's Law Dict.* 276. *6 Do.* 415.)

Three things appear to be necessary to establish a right by prescription.

1st. Use and occupation or enjoyment.

2nd. The identity of the thing enjoyed ; and

3rd. That it should be adverse to the right of some other person.

With regard to the first—as prescription is allowed only to supply the loss of a grant, it is obvious that the use and enjoyment must be continued and uninterrupted. The definition of prescription is “ a title acquired by use and time, and allowed by law ;” (*5 Jacob's Law Dict.* 273. *Co. Lit.* 113.) Possession, Lord Coke says, must have three qualities ; it must be long, continued and peaceable ; or prescription is where from continuance of time *ultra memoriam hominis*, a particular person has a particular right against another ; (*5 Jacob's Law Dict.* 273.) But by modern adjudications, the use and exercise of a right for a time much within the memory of man, have been allowed to furnish the presumption of a grant.

Twenty years appear now to be the settled rule in England ; (*Campbell vs. Wilson*, 3 *East*, 300. *Read vs. Brookman*, 3 *Term Rep.* 157. 6 *East*, 214.) An idea has prevailed that the same rule had been adopted in this state ; though I do not know of any case where such a rule has been distinctly laid down. In the case of *Hill and McClure*, (2 *Constitutional Decisions*, 424,) it was held that a grant might be presumed from an uninterrupted possession of thirty years ; and it is probable that a shorter period than twenty years would not be thought sufficient to authorize such a presumption. Now with regard to the present case, although it appears that *Littlejohn* had possession of Long Island more than twenty years before the commencement of this action, yet it was not very satisfactorily proved, how long he continued there, nor when his successor took possession, nor whether his possession was continued or broken, nor how he or the present plaintiff used the road or path in question. The testimony on all these points was too weak and equivocal, to authorize a jury to take the land of one man and appropriate it to the use of another.

2nd. The second question is, was the road sufficiently identified ? To entitle a person to a right of way by prescription, he must show that he has always used the same way without change or variation. It must not, as is said in *Alban vs. Browsal*, (*Yelverton* 163,) be in one place *hodie* and another *cras* ; and that is one of the characteristic differences between a right of way, arising from necessity, and one by prescription. In the former, the party may plead that he had assigned another, because the law only allows one in such case, a right of egress and ingress ; but it need not always be by the same way. The party claiming the right has no cause to complain, so a convenient way be assigned him even though it vary every day. It is not so with regard to a way by prescription ; for as it is to be established by time and use, and must be "continued, long, and peaceable ;" if it wants any of these, it fails in the essential ingredient of its existence ;

¶1 Comyn's Digest, 285.) The evidence on the part of the plaintiff was very deficient on this point. During the time Mrs. *Stent* owned this plantation, where the defendant now lives, she fenced up the way whenever she pleased, without hesitation ; yet no murmur or complaint was heard. Persons travelling that way, when on foot, submitted to the inconvenience of climbing the fence and going through the field ; and when on horseback "of picking their way" round the fence in the best manner they could. The owner of the land, thus continued to change her fields at her arbitrary will and pleasure, and this road or path varied with every change of the fence. I do not mean to say that every immaterial change of a road ought to be construed into a destruction of its identity. On the contrary, I think that in that respect, regard ought to be had to the situation of the country and the habits of the people. Many of the roads in this state have been established by accident, and grown up from what were originally, neighborhood paths, leading from place to place and extended as population increased, and the intercourse between the inhabitants rendered it necessary. Some have been entirely discontinued, and others more convenient, substituted. Continual changes are still going on as new settlements are formed and new towns and villages established. In a country like this, where a great portion of the land is still uncultivated and uninclosed, such changes are not only necessary, but tend to the improvement of the country. Something of the same sort, I should presume, might be allowed in a private way without destroying a prescriptive right. Changing a road between any two given points merely for the purpose of straightening a fence, or for the convenience of the parties, so that the way is still kept open from one place to the other, I should not consider as destroying its identity. But the entire obstruction of a way by one party without laying off any other, and without the acquiescence of the other party, could hardly be considered as coming within the principle. At least, it will always form a question which should

be distinctly submitted to a jury, whether the exercise of ownership over the way was such as to repel the idea of a right in any other than the owner of the soil.

3d. The third requisite to a right by prescription is, that the use should be adverse to the owner of the soil ; (*Campbell vs. Wilson*, 3 *East*, 294.) It has been decided in this state, that as long as lands remain open and uninclosed, every person may, of common right, pass over them, hunt upon them, &c. And it is within our daily observation, that as long as lands remain in that situation, they are considered as common for those purposes.

Such a use cannot be considered adverse, whatever length of time it may continue, and therefore can furnish no evidence of right ; and such appears to have been the situation of the land in question ; at least a part of the time.—

Goat Island was not cultivated nor inhabited, except by wild goats, horses and cattle. Some people went there for the purpose of catching goats, and others to drive their horses and cattle to the island for pasture. The defendant's plantation was then an open thoroughfare, through which every one passed without consent or molestation. If the defendant, or those under whom he claimed, ever had an exclusive use, it does not appear when it commenced, how long it continued, or in what manner it was enjoyed. I have already remarked that the law on this subject has not, in my opinion, been very well understood in this state. The distinction between the different methods of acquiring a right of way has not been attended to, and evidence applicable to one, has been confounded with that only applicable to the other ; and there is reason to believe that the parties went into the trial of this case without that distinct view of the principles by which the case ought to be governed, that was necessary to a due investigation of its merits. The evidence in relation to some of the important features of the case is too defective to enable us to draw any correct conclusion from it. The

court therefore think it a fit case for the consideration of another jury, and a new trial is accordingly granted.

Justices *Huger* and *Johnson*, concurred.

Simons & Prioleau, for the motion.

Hayne & Hunt, contra.

In the case of *SARAH A. NOWELL, a feme-covert.*

The will of a *feme covert* bequeathing her *choses in action* to her husband, is void, though made with his assent.

Charleston district, January Term, 1823.—Tried before Mr. Justice *Gantt*.

THIS was the case of an appeal from the Ordinary, on a paper offered before him for probate, as the will of a feme-covert. *William Wheeler*, the father of *Sarah Ann Nowell*, made his last will and testament, in which he gave to his daughter, a minor, and unmarried, certain property, real and personal, to and for her own sole and separate use, without being subject to the debts, contracts, or engagements of any husband whom she might have.—Soon after her father's death, she married *John L. Nowell*. No marriage settlement was ever made, nor any power reserved to her to make a will. Some time however, before her death, she executed a paper, purporting to be a will, in which she gives all the personal estate to her husband, the said *John L. Nowell*, with his consent and advice, and appointing him her executor. She died before she came of age, leaving only her brother, *William Wheeler*, her heir at law. The property under her father's will, to which she was entitled, never was reduced into her own or her husband's possession, but was at the time of her death, and at the time of the trial, undivided in the hands of her father's executor.

When this paper was offered by the husband to the ordinary for probate, it was opposed by her brother, and the ordinary decided against the paper, and refused probate.

On this, an appeal was made from the ordinary to the Circuit Court, and the Circuit Court reversed the decision of the ordinary, and directed that the paper should be admitted by the ordinary to probate. From this decision, an appeal was now made on the following grounds :

1st. That by the law of South-Carolina, a feme-covert cannot, without a power specially reserved to her before marriage, make a will of her separate estate, without her husband's consent, and against him.

2nd. That a feme-covert cannot dispose of her choses in action, by will.

3d. That a feme-covert under age, can in no case make a will.

Mr. Justice *Nott* delivered the opinion of the court :

The court do not perceive that the principle involved in this case is at all distinguishable from that decided in the case of *Hood & Archer*, (1 *McCord*, 225.) This, therefore, must be governed by that case, and the motion to reverse the decision in the court below must prevail.

Justices *Huger*, *Johnson* and *Richardson*, concurred.

King, for the motion.

Kennedy & Petigru, Att'y Gen. contra.



DAY, DOWNES & EASTBURN vs. I. & S. W. WILCOX.

It is not sufficient cause to set aside a judgment by default after a term has elapsed, and after the second day of the second court, that the inquiry docket had not been called during the term elapsed ; for if the defendant wished to set aside the judgment at the first court, he should have performed the necessary conditions.

There is no authority for the court's staying proceedings until the plaintiff put in security for costs after judgment by default. The county court act to that effect is not of force.

All reason ceases for ordering the plaintiff to give security for costs after judgment against the defendant. (a.)

Tried before Mr. Justice *Gantt*.

IN this case, there was a judgment by default on the 21st September, 1832, either for want of an appearance or plea. It was placed on the writ of enquiry docket, and remained on that docket during October Term. In January Term, the presiding judge set aside the order for judgment, and ordered the plaintiff's attorney to file his warrant of attorney, and security for costs to be given, or the proceedings to be stayed.

A motion was now made to set aside the order, on the grounds :

1st. That the court erred in setting aside a judgment by default after a term had elapsed, and after the second day of the second term.

2nd. That the court erred in ordering the plaintiff's attorney to file his warrant after judgment by default against the defendant, and staying proceedings until such warrant should be filed.

3d. That the court erred in staying proceedings until the plaintiff put in security for costs after judgment by default against the defendant.

4th. That the court erred in granting terms to the defendant after judgment by default, other than such as are prescribed by the rules of court, and such as stopped the plaintiff from going to trial on the merits of his case.

Mr. Justice *Nott* delivered the opinion of the court :

The act of 1791, (2 *Brevard*, 119,) which regulates the proceedings of the court in this respect, provides, that the plaintiff may take judgment by default against the defendant, "unless an appearance has been regularly enter-

ed by the defendant's attorney with the clerk of the court during the sitting of the said court." The same act also, further provides, "that the defendant, if he puts in an appearance as aforesaid, shall and may put in his plea in writing with the clerk of the said court within one month after the declaration is filed, or judgment may be taken by default." There is nothing in this act which authorizes a defendant to plead to an action, unless he has entered an appearance, "during the sitting of the court" to which the writ is returnable. Nor even when an appearance has been entered, unless the plea be put in within one month after the declaration is filed. Our courts however have by a liberal construction of the act, permitted a defendant to plead where the entering an appearance has been omitted by inadvertance or mistake, &c. So it has been allowed to a defendant when a judgment by default has been taken against him, to vacate the order for judgment, provided he come in by the second day of the court, after which the declaration is filed, and plead issuably to the declaration, and go to trial *instantly*. The rule, I believe, has, in practice, been so far relaxed as to permit the order for judgment to be set aside at any time during the sitting of the court, but never after the whole term has passed over. I do not say that the court may not permit it, even after a term, but it must be for some good cause shown.— Now no cause has been shown in this case, except that the writ of enquiry docket was not called at the October term. But calling the docket could not affect the question. It was a privilege allowed the defendant upon certain conditions, and not having performed the condition, nor shown any good cause why he did not, he lost the privilege itself.

2nd. It is unnecessary to make any remarks on the second ground, as the power of attorney was actually filed.

3d. The order for security for costs ought not to have been made. There is no law in this state requiring security for costs to be given in such case. There is a clause in the old county court act to that effect, but the practice

of this court has not been adopted in consequence of that act. On the contrary, it prevailed long before that act was passed, and that clause was introduced, in all probability, for the purpose of authorizing the County Courts to adopt the same practice, and was always considered as having relation to those courts only, and to have been repealed with the abolition of that part of the judiciary.— The object in requiring security for costs to be given, is to indemnify the defendant in case the plaintiff should fail in his action. But the reason ceases when the plaintiff has obtained judgment by default; for as long as that remains, the plaintiff will be entitled to costs.

The motion is therefore granted.

Justices *Richardson* and *Huger*, concurred.

Pepoon, for the motion.

Dunkin & Campbell, contra.

CRAYTON & SLOAN vs. GEO. W. COLLINS.

The declarations of the payee of a note, made before endorsement against his interest, are admissible, but not after he has endorsed it. An endorser to a note may be a witness to prove that he endorsed it, after it became due.

Tried at Barnwell, before Mr. Justice *Huger*.

Assumpsit on Note.

THIS was an action on a promissory note made by the defendant, and payable to *McKennie & Co.* or order, of Augusta, who endorsed it to the plaintiffs.

The defence was payment; and with a view of letting in a receipt of *Samkins*, one of the firm of *McKennie & Co.* it was attempted to prove that the note had been endorsed after it became due.

A book was introduced, purporting to be the bank book

of *McKennie & Co.* with the bank of Augusta, as also of *Samkins*, as agent of the defendant with the bank. In this book were several entries in the hand writing of *Samkins*, who had removed to Alabama. There were also some figures and calculations in that part of the book which contained the defendant's account with *Samkins*, as his bank agent, apparently made after the note became due, which, it was contended went to shew that it had been paid. These figures, however, were in the hand writing of a Mr. *Randolph*, who lived in Charleston, and not of *Samkins*. This book was not permitted to be given in evidence.

The declarations of *John McKennie*, after the note was endorsed, were offered in evidence to prove that the transfer was made after the note had become due.

This evidence was also rejected.

The plaintiffs obtained a verdict, and this was a motion for a new trial, on the grounds,

1st. Because, as the book offered in evidence, was the book of the original payees of the note, under whom the plaintiffs claimed, the production of that book was of itself sufficient, and the defendant was not bound to prove any thing more than it was their book, and it should have gone to the jury.

2nd. Because the court should not have rejected as incompetent evidence, the declarations of *John McKennie*, which were offered to prove that the note had been paid and that it had been transferred after it became due.

Mr. Justice *Nott* delivered the opinion of the court :

1st. If the book offered in this case had been a regular kept book, containing the transactions of the drawer and payee of the note, and had contained entries made before the note was transferred, showing that it had been paid, it would appear to me that it ought to have been admitted in evidence ; but it was a mere private memorandum book, only intended as a check upon the bank. The entry exhibited to the court was not made in the usual method of

making entries, even in books of that description, but was a loose memorandum of doubtful import, having the appearance of a calculation supposed to relate to this note. But even the memorandum, such as it was, was not in the handwriting of one of the payees, but was made by a stranger who was within the reach of the court, and whose testimony might have been procured. It was not, therefore, such evidence as ought to have been admitted, and was properly rejected.

2nd. The evidence offered in the second instance was much of the same character. It was the declaration of a person respecting a fact of which he might have been called to give evidence. That the endorser of a note may be a witness to prove that it was endorsed after it became due, was decided in the case of *Smith & McDow*, (1 *Con. Rep.* 277.) Declarations of the payee of a note before he has endorsed it, when he alone is interested and against his interest, have been allowed to be given in evidence; but his declarations after endorsement, which go to effect the interest of third persons, cannot be received.

The motion, therefore, must be refused.

Justices *Gantt*, *Richardson* and *Johnson*, concurred.

Martin, for the motion.

Patterson, contra.

JOHN STEELE *ads.* SAWYER & STEELE.

The acceptor of a bill of exchange, and the maker of a promissory note are not liable to an indorser for the costs, which he may have incurred in consequence of default of payment by them.

Charleston district.

Mr. Justice *Nott* delivered the opinion of the court:

In this case, there are two questions submitted to the consideration of the court ;

1st. Whether the acceptor of a bill of exchange and the maker of a promissory note are liable to an indorser for the costs which he may have incurred in consequence of default of payment by them.

2nd. If they are not, whether the maker of the note in this case, is liable in consequence of any special promise or undertaking by him.

1st. I believe the prevailing opinion has been, in this state, that they were liable for the costs in all the actions brought against the endorsers, though I do not know that the question has ever been directly made before. In the cases of *Smith vs. McDow*, and of *Huig vs. Newton*, (1 *Con. Rep.* 277-422,) it appears to have been assumed as a conceded point, that they were so liable, but the point was not contested. In the case of *Richardson vs. Presnal*, (1 *McCord's Rep.* 192,) the reasoning of the court would seem to lead to a different conclusion, though the question was not necessary to the decision of the case. In *Bailey on Bills*, it is said that it had been the prevailing opinion, that where an action had been brought against several indorsers, that the action would not be stayed against one, upon paying the debt and costs in the action against himself, unless he would also pay the costs in all the actions against the subsequent indorsers, against whom judgments had not been obtained. But that it had been lately held that none but the acceptor who had made the original default was liable for the costs in all the actions. The same doctrine is laid down in an early edition of *Chitty On Bills*, 290 ; and both rely on the case of *Smith vs. Woodrock*, (4 *Term Rep.* 691,) in support of that position. From these authorities, it would seem inferrible that the acceptor of a bill, and the maker of a note, are responsible for the costs of all the actions against the endorsers. And in *Maxwell On Bills*, 73, the law is so expressly laid down. But in the case of *Simpson vs. Griffin*, (9 *Johnson*, 131,) it is directly

decided that the maker of a note is not liable to the payee for costs which he has paid as indorser. And in a later edition of *Chitty*, 473, after stating that the court will not stay proceedings against an acceptor without paying the costs of all the actions, he adds, it will, therefore be the least expensive course for the acceptor to suffer judgment to go against him, in which case, he can only be charged with the costs of the particular action against himself. And in 1 *Tidd's Practice*, 482, the same rule is laid down as in *Baily* and *Chitty*, with regard to staying proceedings ; but, says the author, "if the plaintiff proceed to judgment, each defendant is liable for his own costs, and the plaintiff cannot take out execution against one defendant for the costs of another." In the case of *Gilman vs. Carr*, (2 *Muss. Rep.* 171,) it was decided that if the indorsee accept satisfaction from the indorser, he cannot have judgment against the drawer of a note, even for costs ; but on the contrary, the maker of the note was entitled to costs. Judge *Parker* said, it was a case in which a party might bring several actions for the same sum, but that he did it at his peril as to costs ; and the whole court agreed, (of which chief justice *Parsons* was one,) that having received satisfaction in one action, he could not maintain the other.

The reason therefore why the court will not stay proceedings against the acceptor of a bill or the drawer of a note, without the payment of the costs of all the actions against the indorsers, against whom judgments have not been obtained, is not because they (the acceptor and the drawer of a note) are liable for those costs, but because it would thereby throw the costs of all those actions on the plaintiff. And as they have committed the first fault, and thereby occasioned all those costs, the court will give no relief unless they will pay them, but will let the plaintiff proceed to judgment against all the parties, to enable him to recover his costs in all the actions. It may be said that although the holder cannot tax the costs of the other actions against the acceptor, yet the endorsers may main-

tain their actions against him for the costs which they have paid, as so much money paid for his use. But it will be perceived that he has not been benefitted by the payment of those costs, and the indorser may always save himself from costs by paying up the money, which he is under as great an obligation to do as the acceptor; and the fact that no precedent of such an action can be found, is of itself a strong argument against it. I think therefore that the defendant is not liable for the costs paid by the indorser.

2d. With regard to the promise of the defendant, it was nothing more than that he would settle the debt with the plaintiff; it was a promise that he would do what the law required him to do, and no more. There was no such undertaking as would make him liable on the ground of a special promise. I am of opinion, therefore, that a new trial should be granted, unless the plaintiff will release that part of the verdict which embraces the costs of the action against the indorser.

Justices *Richardson, Huger* and *Gantt*, concurred.

Rice, for the motion.

Dunkin, contra.

THE STATE vs. WILLIAM CALDER, *et alias*.

A negro servant, (slave) with two white persons, may commit a riot. Where persons, unknown, with the person indicted were necessary to constitute the offence of a riot, they should be stated to be unknown, and so proved: If known, it should have been stated who they were. Where it incidentally came out on the examination that the domesticks (slaves) of one of the persons indicted for a riot, were present, and by his order took off some furniture, the court *held*, the evidence was not such as would constitute them parties to the combination necessary to complete the offence of a riot.

THIS was an indictment against *William Calder*, *Priscilla Calder*, *John McAdam* and *George Keenan*, "and divers other persons, to the jurors unknown."

The indictment contained two counts; one for a riot, and the other for an assault and battery.

The jury acquitted *John McAdam* and *George Keenan*. They found *Priscilla Calder* guilty of a riot, and *Wm. Calder* guilty of a riot and assault.

It appeared in evidence that Mr. *Alexander Calder*, the husband of *Priscilla Calder*, had let his billiard room, &c. to *Adolfe Bionbergh*, the prosecutor. Mr. *Calder* had left the state, and made his brother, the defendant, his attorney in his absence. Some difference having taken place between the parties, with regard to the execution of the contract, Mr. *William Calder* and Mrs. *Calder* attempted to regain possession of the billiard room, books, &c. which lead to the alleged riot. In the course of the examination of the testimony, it appeared that some of the domesticks of Mr. *Calder* were present. They assisted in taking away some of the things, and in fastening up the house by the order of Mrs. *Calder*. But that testimony came out incidentally in the course of the examination, and not by any direct enquiry as to the part which they took in the transaction.

This was a motion to arrest the judgment, on the ground that two persons cannot commit a riot, and that as only two are convicted, judgment cannot be rendered against them.

In support of this ground, it was contended :

1st. That a negro in this state is not such a person in contemplation of law as can commit a riot.

2nd. That the principle does not apply to domestick servants, acting under the immediate orders of their master or mistress.

In case the motion in arrest of judgment should fail, then a motion was made for a new trial, on the ground that the evidence was not sufficient to establish the fact of

any such concert or co-operation on the part of the servants as to implicate them in the riot ; and,

Also on the ground of surprize in the charge of the court, that the co-operation of the servants was sufficient to authorize the jury to find any number of the defendants guilty, when, from the manner of conducting the prosecution, the defendants were not induced to believe that any such ground would be relied on.

Mr. Justice *Nott* delivered the opinion of the court :

The law is too well settled to be questioned at this day, that less than three persons cannot commit a riot. If, therefore, any number of persons are indicted, and all but one or two are acquitted, judgment cannot be rendered against those who are convicted, unless the act be charged to have been committed with other persons unknown.— But if it be charged in the indictment, and proved, that there were other persons concerned, who were unknown, the conviction is good. In the case now under consideration, the indictment charges the offence to have been committed with “ divers other persons to the jurors unknown.” On the face of the indictment, therefore, there does not appear to be any legal objection to the conviction. It did not appear from the testimony that the domesticks were slaves, or even that they were black persons. That is an inference drawn from the fact that there are few servants in this country except of that description, and from the universal understanding, that when a servant is spoken of, a person of color is meant. But if we allow to the word its usual acceptation, the result will be the same. In the case of the *State vs. Thackam & Mayson*, (1 Bay, 358,) it was decided that a negro might be a party to a riot, so as to render the other person or persons concerned guilty, though not amounting to three in number ; and this was not a *nisi prius* case, as is supposed, but is a decision of the Constitutional Court. It is not said in so many words in that case, that the negro was a slave, yet it seems to be inferrible from the whole case

taken together, and the decision of the court certainly does not contemplate any distinction between a free man of color and a slave. There does not, therefore, appear any ground on which the judgment can be arrested. But it does not appear that the servants were unknown. If they were known, it should have been stated who they were. If they were not known, that allegation ought to have been proved. But even if it had been proved that they were unknown, I think the evidence would not have been sufficient to have authorized a conviction. There was no such evidence of combination or agency on their part as would have implicated them. Besides the whole course of the examination was directed to the conviction of the persons mentioned in the indictment, with little reference to those who were represented as unknown. The servants appeared to be only incidentally mentioned, without any apparent intention of procuring a conviction, on the ground of an association with them. I think, therefore, that the verdict, so far as it relates to the conviction for a riot, ought to be set aside. Mr. *Calder*, however, is convicted on the second count for an assault. That was a question for the consideration of the jury, and I think the charge was sufficiently supported. The motion for a new trial on that count is, therefore, refused.

Justices *Richardson*, *Gantt* and *Johnson*, concurred.

Hunt & Crafts, for the motion.

Petigru, Att'y Gen. contra.

THE CITY COUNCIL vs. JOHN VAN ROVEN & E. VAN ROVEN, his Wife, a sole dealer.

The evidence, to convict a person under the 13th clause of an Ordinance of the City of Charleston, of 1815, prohibiting retailers of liquors from selling to persons of color, or admitting them into their

premises, after certain hours, is sufficient if it be proved that such persons were seen in such shop, after such hour, drinking spirits and water ; though no money was seen paid.

The court *held* that a feme covert, sole dealer, was liable to the penalty under such ordinance, though the liquor was handed to the negro by her husband, she being present, and he acting as her clerk.

The words " admit into his or her premises any negro or person of color, or in any manner sell or retail to the same," do not mean " admit into his, &c." and " in any manner, &c."

Charleston district.

The following is the report of the Recorder :

THIS was a prosecution against *E. Van Roven*, a sole dealer, for a breach of the 13th clause of an ordinance of the city, passed on the 17th July, 1815. Tried before the recorder, in April term, 1823, who made the following report : This clause enacts that no person to whom a license shall be granted, shall after the hour of 8 o'clock, P. M. from the 20th September, to the 20th March, admit into his or her premises any negro or person of color, or in any manner sell or retail to the same or any of them, any liquors whatever, under the penalty of \$ 50.

It was proved that the defendant, *E. Van Roven*, was a sole dealer ; that she had taken out a license to retail spirituous liquors, and that she was the wife of *John Van Roven*.

Mr. *Wish* deposed that *E. Van Roven* kept a retail liquor shop in the city ; that on the 8th of February, 1823, he and Mr. *Moses* saw several negroes in her shop after 8 o'clock, P. M. That some of the negroes were drinking spirits and water, and that at this time, to the best of his recollection, *John Van Roven* was present. Mr. *Moses* said, that on the night of the 8th of February last, after 8 o'clock at night, he went to the shop of Mrs. *Van Roven*, in which he saw several negroes ; that *John Van Roven* delivered liquor to some of the negroes, which they drank ; that at this time, Mrs. *Van Roven* was in the shop, but did not hand any liquor to the negroes ; that he saw no money paid, neither did he see any money upon the counter.

I stated to the jury that I thought, under the ordinance,

that the penalty could not be recovered, unless it were proved that liquor had been sold to a negro after 8 o'clock at night ; that according to the literal meaning of the words, the penalty would attach for the mere admission of negroes into the premises after 8 o'clock at night ; that negroes, after this hour might by their owners, be sent to the house of one keeping a retail liquor shop, with a letter or a message, or they might go there of their own accord to visit other negroes ; that where negroes, under such circumstances, were upon the premises, it could not have been contemplated by the law that the penalty should be incurred ; that the offence intended to be guarded against, was permitting negroes to assemble and selling them liquor after a certain hour, for which purpose they would resort to the shop ; that according to this view, it seemed to me that the word " or," in the clause ought to be read " and ;" when the meaning would be, that one having a license, should not, after 8 o'clock at night, admit into his or her premises any negro or person of color, and in any manner sell or retail to the same, any liquors whatever, under the penalty of \$ 50 ; that if this construction of the clause were correct, it was questionable whether the offence had been established ; that if a sale was necessary to complete it, although abstractedly considered, there might be little doubt but that the negroes paid for the liquor they drank, yet that this fact ought to be proved, or some circumstances be testified to, from whence the inference would reasonably follow that what had been drank, had been sold and not given ; and no such fact or circumstance had been mentioned ; that even should it be presumed that there had been a sale, yet the individual making it was not the defendant, but her husband ; and though the wife in many instances, was presumed to act under the control of her husband, yet it was never presumed that the husband was under the control of the wife ; that a sole dealer might so far constitute her husband her agent, as to be bound by his acts, but that she could not be bound by them unless the agency of the husband was shewn, either

by some express authority or by some implication from which such authority was to be deduced.

The jury found a verdict for the city.

Notice was served upon me that a new trial would be moved for on the following grounds :

1st. That there was no evidence that the liquor was sold or bartered.

2nd. That if a sale could be presumed, it was the act of the husband and not of the wife, for which she could not be responsible:

3rd. Because the verdict was contrary to law, to the charge of the recorder, and not warranted by the evidence.

Mr. Justice *Nott* delivered the opinion of the court :

I do not think that the ordinance under which the defendant has been prosecuted, is so well penned as it might have been. But I am not prepared to concur with the Recorder in the construction which he has given to it. I do not think that we are even at liberty to convert "or" into "and" unless we can see clearly that it better comports with the spirit and policy of the law ; and of that, I am by no means satisfied in this instance. The object of the City Council was to prevent that demoralizing practice of selling spirituous liquors to negroes in the night ; and for that purpose, they have prohibited all retailers from admitting them into their premises, or selling to them any liquor whatever, after a certain hour. The penalty is incurred by selling liquor to a negro after 8 o'clock, whether he enters the shop or not ; and from the difficulty of detection, it became necessary to prohibit them from even admitting them into their premises. But admitting the construction given to the ordinance by the Recorder, to be correct, I think the evidence was sufficient to authorize the conviction. Two witnesses saw several negroes in the shop, drinking spirits and water. They saw the husband of the defendant, handing them liquor in her presence. Now, although they did not see any money paid, yet I think, these facts furnished sufficient evi-

dence of a sale, to throw the burthen of proof on the other side. This was confessedly a retail liquor store ; the retailing was clearly proved, and I think, it might be fairly presumed that the liquor was sold. (It is, however, contended that if there was a sale, it was by the husband and not by the wife ; and that although a wife may be presumed to act under the influence of a husband, a husband is never to be presumed to act under the influence of the wife. It is true, the husband and wife in contemplation of law, are considered in many respects as one person, and the husband being *primus inter pares*, whatever the wife does in his presence, is presumed to be done under his control or coercion. The same principle of law vests the personal estate of the wife in the husband, and gives him absolute dominion over it. But in the progress of civilization and the extension of commerce, an artificial state of society has grown up, incompatible with that state of simplicity from which many rules of the Common Law have been derived. A feme covert sole trader, is a new species of body corporate, not known in former times. The Common Law did not contemplate a case where a wife might hold property separate and apart from her husband, might deal, trade and traffic, enter into contracts, sue and be sued, in the same manner as if she were sole. Such a change in the relative rights and powers of husband and wife, must give a different operation to the rules of law by which they are to be governed. While the right and disposition of the property remains in the husband, any intermeddling of the wife is presumed to be as his agent, and under his influence. But when the dominion is transferred to her, she must have it with all "the rights and appurtenances thereunto belonging." All the property in this store belonged to the wife. The husband could not sell a gill of whiskey but by her permission. Whatever he did then in her presence, must be considered as her act. Any other view of the subject, would render the ordinance in such a case, almost nugatory. The wife could not be convicted when selling in the presence of the hus-

band, because she would be presumed to act under his coercion. The husband could not be convicted, because the sceptre having departed from his hands, he is not embraced in the law. I am satisfied with the verdict, and the motion, therefore, must be refused.

Justices *Richardson*, *Huger* and *Johnson*, concurred.

Dunkin & Campbell, for the motion.

Toomer, contra.

JOHN MAY vs. JOHN WALTERS.

A sheriff cannot, even by his deputy, serve a writ in his own case.

Tried before Mr. Justice *Huger*, Colleton district, April Term, 1823.

THIS case came before the court on a motion to set aside the service of the writ, because the plaintiff being sheriff of the district, the writ ought to have been served by the coroner and not by the sheriff's deputy. Which motion, the presiding Judge overruled: Whereupon this court was moved to reverse the decision of the Circuit Court, and to set aside the service of the writ upon the above ground.

Mr. Justice *Richardson* delivered the opinion of the court:

The act of 1706, (*P. L.* 11,) declares, that every coroner, &c. shall be and is hereby empowered to serve and execute all writs and processes directed unto him against the marshal, &c. and also in all causes wherein the marshal is plaintiff, &c." This act gives the power of serving writs, wherever the marshal or sheriff is concerned, to the coroner; and the only question is, whether the sheriff may not also serve such writs? In treating of the court of the coroner, Lord *Coke* says, "besides his judicial place, he has also authority ministerial, as a sheriff, &c. &c. viz: when there is just exception taken to the

sheriff, judicial process shall be awarded to the coroner for the execution of the king's writs, in which case, he is *locum tenens vice comitis*; (4 *Inst.* 271.) And in *Cro. Charles.* 300, it is laid down, that if the sheriff is either plaintiff or defendant, or one of the cognisees, the writ must be directed to the coroner. (See also *Salk.* 144; 2 *Jacob's L. D.* 87. 1 *Plowd.* 73.)

By the rules of the common law then, and in my judgment, upon the sound construction of the act, taking into consideration its policy, which is to prevent the sheriff's acting in his own case, and regarding the remedy afforded against his possible self-interest, it appears that the service of the writ by the sheriff, in his own case, is void.

The motion is therefore granted.

Justices *Johnson* and *Nott*, concurred.

Gantt, Justice: I think the sheriff in this action being a mere nominal plaintiff, he might legally serve the writ.

Ford & De Saussure, for the motion.

Hunt, contra.

JOHN THOMPSON vs. Ex'rs. of ROBT. NESBIT.

Upon a contract with an agent to act as overseer for \$500, the employer wrote these words, "I also further say that should the above named T. in my opinion, merit or deserve more than \$500, I will give him more." The court held it was voluntary, and set aside a verdict allowing more than \$500.

Tried before Mr. Justice *Gantt*, Georgetown.

THIS was an action brought to recover wages as an overseer. It was proved that the plaintiff lived as an overseer on the plantation of the testator for twelve months; that by the original contract, the wages were to be eight

hundred dollars. But it was shewn that after remaining a short time on the plantation under that agreement, the plaintiff misbehaved and abused his employer ; in consequence of which he was discharged. But the testator, Dr. *Nesbit*, agreed to restore him upon the condition that he would rescind the former agreement, as to the amount of wages, and be content with the sum of five hundred dollars. This second contract, which was reduced to writing, was produced in court and proved. The payment of four hundred dollars was also proved. It appeared in evidence that the plantation was, during the superintendence of the plaintiff, generally in indifferent order, and that the crop was not great. Something was said about a proposition to compromise having been spoken of by one of the executors at six hundred dollars, and never acceded to by the plaintiff.

The judge charged that the jury ought not to find more than at the rate of \$ 500 for the plaintiff.

They however found at the rate of \$ 600.

The defendants now moved for a new trial, on the following ground :

1st. That an express contract for five hundred dollars was proved, and the jury allowed to the plaintiff, notwithstanding, six hundred dollars.

Mr. Justice *Richardson* delivered the opinion of the court :

The agreement to pay five hundred dollars was set forth in a letter by the testator, and the terms accepted by the plaintiff. But at the foot of the agreement, these words were added, to wit :

“ I also further say, that should the above named *M. Thompson*, in my opinion, merit or deserve more than five hundred dollars, I will give him more.”

(Signed,)

ROB'T NESBIT.

And the question submitted is, whether the executors are bound to pay more than the five hundred dollars ?

It is evident from the restrictive words, “ in my opin-

ion merit," &c. that the testator meant no more than to hold out the prospect of an indefinite reward upon the contingency of the defendant's giving him satisfaction.— He meant to afford an incentive to activity and good conduct; and the very object of the hoped for reward, requires that it should depend upon the will and opinion of the promiser. To make such a contingent and imperfect promise a binding obligation in law would be to destroy the end for which the lure was held out. After having once turned off his overseer for misbehavior, *Nesbit* reasoned, naturally, from what had passed, and contracted anew, with greater caution drawn from experience, and therefore resolved to keep the alluring bait within his own control. His policy is obvious, and is not unlike that observed by a skilful fowler towards his trained hawk, whose instinct being known, is therefore kept alert by hunger until the game be taken.

My falcon now is sharp, and passing empty,
And till she stoop, she must not be full gorged,
For then, she never looks upon her lure.

The jury were therefore mistaken in forcing the payment of what was intended as a gratuity, to be apportioned by the employer, according to the conduct and success of his overseer; and a new trial is granted, unless the plaintiff will release one hundred dollars from the amount of the verdict.

Justices *Johnson*, *Nott* and *Huger*, concurred.

Dunkin, for the motion.

Simons, contra.

THE STATE vs. WILLIAM MAZYCK.

Under the act, laying a fine upon the planter of fifty cents per month upon each working slave, if he owns ten, and employ not a white man or reside on the place, the penalty for the whole year may be recovered; and the penalty (or penalties) for the first six months is not barred.

The penalty attaches *at the end* of the year at the rate of fifty cents monthly for every working slave.

Charleston, January Term.—Tried before Mr. Justice *Gantt*.

THE defendant was indicted at January sessions, 1823. The offence was laid in the indictment as follows, that *William Mazyck* is the owner of a settled plantation in the parish of Saint John's, and that from the first day of January, 1822, he hath employed and still doth employ on the said plantation, more than ten working slaves, and that the said *William Mazyck* hath not during the said period employed, and still doth not employ, on the said plantation, a white man capable of performing patrol duty, against the form of the act, &c.

The evidence supported the indictment to the full extent of the time, &c. laid ; and the jury found the defendant guilty.

But a question then arose, as to the amount of the penalty to be recovered.

The Attorney-General moved for judgment, that the defendant pay a fine of sixty dollars, being a penalty of fifty cents per month for each working slave for twelve months.

It was contended for the defendant that no penalty could be recovered by this indictment, except for six months immediately preceding the finding of the bill.

And of this opinion was the presiding judge, who refused to enter judgment for twelve months.

The Attorney-General did not call the defendant to receive sentence, but appealed from the decision, and now submitted to the Constitutional Court the motion made in the court below ; viz. because the offence of which the defendant has been convicted is, under the act, one entire offence, and the penalty recovered is one penalty, and therefore no part is barred unless the whole be barred.

Mr. Justice *Richardson* delivered the opinion of the court :

The act upon which the indictment is predicated is in the following words, to-wit :

“That every owner of any settled plantation shall employ and keep on such plantation, some white man capable of performing patrol duty, under the penalty of fifty cents per head per month for each and every working slave which may be on such plantation, to be recovered by indictment, one half to the informer, the other half to the use of the state : Provided always, that nothing herein contained shall be construed to affect any person or persons who reside on his, her, or their plantation for the space of seven months in the year, or who shall employ less than ten working slaves on such plantation.”

Upon this clause of the act, the defendant has been convicted for keeping no white man upon his plantation; whereon he had employed ten working slaves in the year 1822, and upon which he did not reside in person as required by the act; and the question is, shall the defendant be fined fifty cents per month for each slave for the whole year, or is so much of the monthly penalty as transpired more than six months prior to the prosecution, barred by lapse of time ?

In other words, is the penalty to be assessed at the end of the year only, or does a distinct penalty accrue at the end of every month, each to be considered separately ?

The enacting clause fixes a penalty of fifty cents per month for each working slave, where no white man is employed, and would bear the latter construction. But the proviso makes an exception in favor of any owner who may reside upon his plantation for the space of seven months during the year. We have then to remain in suspense till the end of the year, in order to discover whether the owner shall have brought himself within the exception, by residing seven months. Here then we have a clue to the true construction. The owner may choose the periods ; *exempla gratia*, he may reside five months in the beginning, and two at the end of the year. But the year must have terminated before we can ascertain whe-

ther he has resided there for seven months during that period. If he has not resided so long within the year, then in default of having employed a white man, the penalty attaches at the end of the year at the rate of fifty cents monthly for every working slave, during the time he had no white man employed, and was himself absent. The policy of the law is evident. The owner or some white man must be present throughout the year, but the presence of the owner, in person, for full seven months, is deemed equivalent thereto; and if he reside on the plantation, but for a less time than seven months, then he must employ some white man, at least, for the rest of the year. The penalty is, therefore, entire, and to be assessed according to the degree and time of default after the expiration of the year only. In this case, the default being for the whole year, and the slaves ten, the penalty is sixty dollars. The motion is granted.

Justices *Nott* and *Johnson*, concurred.

Petigru, Att'y Gen. for the motion.

Mazyck, contra.

POLLARD BROWN vs. WM. THOMPSON.

The assignee of an open account cannot offer the account in discount of his own, sued upon by the plaintiff.

Assumpsit on account.—Pleas, non-assumpsit & discount.

Tried before the City Court, in January Term, 1823.

The following is the report of the Recorder.

THE only question in this case was, whether an account assigned to the defendant, which was due by the plaintiff to a third person, could be pleaded in discount against the plaintiff's action? It was stated and admitted

that both accounts were for the same amount. I was of opinion, says the judge, that the discount was legal and admissible under the authority of the case of *Russel vs. Lithgow*, (1 Bay, 432.) Notice was served upon me that my decision would be appealed from, and it is necessary to remark that I never said that the assignee of an account could maintain an action upon the assigned account in his own name. What is contained in the third ground was not mentioned during the trial, or in any manner brought to my notice. On the contrary, it was in so many words stated by the counsel for the plaintiff, that the only question existing was, whether an assigned account under the discount law could be pleaded in this action?

Mr. Justice *Richardson* delivered the opinion of the court :

It was decided in the case of *Russel vs. Lithgow*, that the assignee of a bond may plead such bond in discount against his own bond, which is sued in the name of the obligee, but on account of a third person who was the obligor of the assigned bond, offered in discount. In that case, in as much as *Kershaw*, the assignee of *Lithgow's* bond, had sued in the name of *Russel*, there was reciprocal equity in allowing *Lithgow*, the assignee of *Ancrum*, to plead *Kershaw's* bond in discount. The suit was really between *Kershaw* and *Lithgow*, who were reciprocally the assignees of each other's bonds. But should we extend this principle by analogy, so far as to allow a defendant, whenever he is sued by his creditor, to set up by way of discount, any unliquidated demand upon the plaintiff, which he the defendant may be able to obtain from any body, it would introduce collateral issues, and involve in vexatious litigation the plainest cases of acknowledged debt. The assignee of a bond, note, or judgment, when he contracted for either, would have to enquire, not merely into the state of an account between the assignor and his debtor, but whether the debtor might not

possibly have picked up some account or unknown claim against the assignor, which he may offer in discount whenever sued by the assignee. It should be observed too, that although courts have gone far in restricting the old rule, that choses in action are not assignable, (*Co. Litt.* 214, 266. 2 *Roll.* 45, b. 40,) and speak of the assignments of bonds before our act as good between the parties, (12 *Mod.* 554,) and have held that the assignment of a chose in action was a good consideration for a promise, (1 *Roll. Abr.* 29. *Sed.* 212,) and in one case, when the debt assigned was uncertain, (2 *Wm. Blacks.* 820, *Mouldsdale ads Berchall*,) yet, I know of no recognition of the right of the assignee of an unliquidated account to sue in his own name, nor of his rights as assignee strictly; though he may act as the attorney of, and appropriate the money recovered, as agreed by the assignor. But to allow the assignee to plead the assigned account by way of set off, would be to recognize his rights as assignee, which is opposed by the rule before noticed, and which must be still regarded, at least in relation to unacknowledged or unliquidated claims.

The motion is therefore granted.

Justices *Gantt*, *Huger*, *Nott* and *Johnson*, concurred.

Heath, for the motion.

Pepoon, contra.



JOHN P. SCHATZILL & Co. vs. JOHN & CURTIS BOLTON.

Partnership property may be attached for the individual debt of one of several copartners.

Partnership property may be attached for the individual debt of one of the partners, after the partnership has been dissolved, and a receiver appointed by court to get in and dispose of the assets.

S. W. C. and A. under the firm of S. & Co. were in company, and did

business in Lexington, Kentucky, and C. and A. two of the partners, did business in New-York, under the firm of A. C. & Co. On the 1st Nov'r the Kentucky house dissolved, and afterwards the N. York house being complainants, and the Kentucky house defendants to a suit in the U. S. Circuit Court, at Lexington, the court appointed S. of the Kentucky house to get in and pay away the partnership assets, and commissioners were appointed to state the accounts between the partners. On the 6th August, 1818, *Bolton & Co.* attached in Charleston funds of the Kentucky house, for a debt due by the New York house. The Kentucky house contended that in consequence of the decree in Kentucky, the funds of that house were not subject to such attachment until a settlement under that decree; but the court refused to discharge the attachment.

Charleston, January Term, 1823.—Tried before Mr. Justice *Gantt*.

John P. Schatzill, John Woodward, Alex. Cranston and *Andrew Alexander*, were partners in trade at Lexington, Kentucky, under the name of *John P. Schatzill & Company*. *Alexander Cranston* and *Andrew Alexander* were partners in trade at New-York, under the name of *Alexander Cranston & Co.* The former partnership was dissolved on the 1st of November, 1817.—The latter being indebted to *J & C. Bolton*, they sued out an attachment in the Court of Common Pleas for *C. T. D.* on the 6th August, 1818, and laid it on funds of *J. P. Schatzill & Co.* in the hands of *John Robertson* as garnishee, who paid them into court. Whereupon, *J. P. Schatzill & Co.* claim them as exempt from the attachment against the New-York partners, *Alexander Cranston & Co.*

An issue was accordingly directed to try the right.

To the plaintiff's declaration, the *Bolttons* pleaded that *Cranston & Alexander* were partners in the Kentucky house; that they were indebted to them, the *Bolttons*; that the attachment had issued, and a judgment was obtained on the 17th June, 1820.

J. P. Schatzill & Co. replied that their partnership had been dissolved; that the Circuit Court of the United States, at Lexington, had on the 1st of November, de-

creed in a suit, in which *Cranston & Alexander* were the plaintiffs, and *Schatzill & Woodward*, the defendants, that *Schatzill* should get in and pay away the partnership assets. That certain other persons should state the accounts of the company and of each partner. That *Schatzill* accepted the trust, and the commissioners proceeded to act. That *Cranston & Alexander* were entitled to nothing until a final settlement, which rightly belonged to the court at Lexington, and that until a balance be found due to *Cranston & Alexander*, the partnership property is exempt from attachment for their debts.

J. & C. Bolton demurred to this replication of *J. P. Chatzill & Co.* who joined in demurrer.

After argument, the judge overruled the demurrer upon the following grounds;—that partnership property circumstanced like this, is not liable to attachment for the debts of individual partners, and that the control over, and disposition of the fund belonged of right to the United States Court at Lexington, and that the property must therefore be adjudged to the claimants as the property of the Lexington house. From this judgment an appeal was taken.

Mr. Justice *Richardson* delivered the opinion of the court :

Two questions are presented by the demurrer :

1st. Whether partnership property may be attached for the individual debt of one of several copartners ?

2nd. Whether such property can be so attached after the partnership has been dissolved, and a receiver appointed to get in and dispose of the assets, &c. ?

The attachment act of 1744, renders the “monies, goods, debts and books of accompts” of absent debtors liable to be attached ; and it is not supposed that the monies, &c. which an absent debtor holds jointly with other persons, may not be attached for his individual debt.— This has been too often practised to be now questioned as a general rule ; and it is equally well settled that partner-

ship property is liable to be taken in execution upon a judgment obtained against one of the copartners. (See 2 *Bos. & Pull.* 288. 2 *Dallas*, 278. *Salk.* 392. 1 *East.* 367. 15 *Johnson*, 180.) In the case of *Hayden vs. Hayden*, (1 *Salk.* 392,) the court says, in such cases, the sheriff is to seize all and sell a moiety, and the vendee becomes tenant in common with the other copartner. In this respect, the copartnership property is like any other joint property, &c. But it is said, that as the proper creditors of the copartners have a preference to individual creditors in the distribution of the copartnership fund, the individual creditors must remain suspended until it shall appear that there is a nett balance remaining after the payment of all the copartnership creditors; but assuredly while there is no contest between these classes of creditors, expressly laid before the court, we cannot deny to the plaintiffs the right of attaching any vested interest, joint or several, belonging to their debtors. It is enough that there is a vested interest, and the possibility that there may be copartnership creditors who may be hereafter preferred, cannot destroy the *prima facie* claim of attaching, given to the individual creditors. In every case, difficulties may arise. Upon property held in severalty, joint tenancy or in common, there may be mortgages or other liens which may finally render the attachment fruitless; but until these appear specifically, we cannot foresee their effect, and therefore cannot regard them. For instance, take the case of one of several distributees of an intestate's estate. The estate may be variously incumbered; but the apprehension of incumbrances cannot destroy the right to attach, although should any such appear, the attachment will not have destroyed their prior liens. In this respect, I can perceive no difference between such an estate vested in distributees and a joint interest held by copartners. Both are joint estates, and may be respectively incumbered, and are equally liable to certain peculiar creditors in preference to others. But until these appear, "*de non apparentibus et de non existentibus eadem est lex*," is

the rule ; and even when they do appear as there may be a *residuum*, it does not follow that the attaching creditor is to be estopped. Wherever there is an interest in his debtor, he may lay his attachment upon it, though finally it may be exhausted by prior claims. An estate may be mortgaged for thrice its value, but being still in the debtor, it stands in lieu of his person and is subject to attachment, notwithstanding, that when marshalled, the attaching creditor may find nothing for his share. It is urged, secondly, that by the order of the Court in Kentucky, the copartnership funds have been placed in the hands of *J. P. Schatzill*, one of the copartners. But this order sprang out of a suit between the copartners themselves, and is simply an arrangement for the purpose of settling, finally, the affairs of the concern. It places the assets in the hands of one instead of four copartners, which is convenient and safe ; but it alters no right to, or claim upon the funds. Even considering the order of the court as an assignment of the assets generally, yet it could not create a lien upon the fund discovered in this state, in derogation of the rights of creditors, who, by our laws, have acquired a specific lien upon the fund here attached. Even then, *Schatzill*, the receiver, could not be in a better situation than the assignees of a foreign bankrupt, who would claim by virtue of the assignment, the rights and interests of the bankrupt in this state. And in the well considered case of the assignees of *Topham vs. Chapman* and others, (1 *Constitutional Rep.* 283,) this court decided that the specific lien acquired here by *Chapman* and other attaching creditors, though subsequent to the bankruptcy of *Topham*, was nevertheless paramount to the general right of the assignees of the bankrupt. But I cannot admit that the appointment of a receiver in Kentucky, amounts to an assignment of the copartnership funds. That proceeding merely substitutes one of the copartners in the place of all, in order to settle with great facility, complicated transactions. It was very properly ordered, at the request of the copartners, and leaves the creditor in *statu quo*.

The motion is therefore granted, and the defendants have leave to enter up judgment upon their demurrer.

Justices *Huger* and *Nott*, concurred.

Mr. Justice *Gantt* dissented.

Hayne & Grimke, for the motion.

Petigru, Att'y Gen. contra.

THE STATE vs. WILLIAM H. TAYLOR.

The Statute of limitations confining prosecutions for fines and forfeitures to six months, relates not to the fine inflicted upon a white person for murdering a slave, nor does it seem to relate to the punishment by fine or otherwise of any felony.

The act of 1740, to punish the murder of a slave, is not repealed by the act of 1821, taking away clergy.

Where an act has been repealed or a new act made of force, persons guilty under the first act may be indicted, convicted and punished after it is repealed, for an offence committed before its repeal. (*a.*)

Mr. Justice *Bay* delivered the opinion of the court:

THIS was a case of murder, tried before me in October last. The indictment contained two counts; one for murder, the other for manslaughter. The evidence against the prisoner was very clear and conclusive, and may be comprised within a very narrow compass. It appeared that two of the prisoner's negroes had run away, and *Jacob* particularly had been absent for some considerable length of time; that upon getting some information of them, he went in pursuit of them, and caught them somewhere about Wappoo Creek; that upon getting them into his possession, he caused their hands to be tied behind their backs, and then tied the two together, and ordered

(*a.*) *Vide, Ante, State vs. Cole, page 1.*

them into a boat or canoe to bring them over to Charleston, and made them sit down in the bottom of it, while he sat in the stern with a loaded double barrellled gun beside him. That in the afternoon of the 7th day of June, 1821, as the boat approached the shore or landing, near the end of Beaufain-street, the prisoner, when about 100 yards from the shore, took up his gun and deliberately took aim at *Jacob*, saying, "damn you, you shall never kill any more hogs," and fired off one of the barrells at him. But as the negro sat in the bottom of the boat, with his knee up in a line with his body, the contents of the gun struck his knee instead of entering his body. As soon as the boat reached the flood-gate or place of landing, Mr. *Robert Hume*, who was standing on the shore, looking at the boat as it approached, and who saw the flash and heard the report of the gun, went with several others up to the boat, and there they found the prisoner with the gun in his hand, and the negro laying on his back in the bottom of the boat, bleeding from the wound. Mr. *Hume*, who was a principal witness for the prosecution, and who appears to have had great merit in carrying on this prosecution, in the cause of humanity, asked the prisoner if he had shot the negro, who answered in the negative, and said the gun had not been fired for a year. The witness, Mr. *Hume*, then demanded the gun from him, in order to see whether it had been discharged or not. But he refused to give it up. Mr. *Hume*, however, went to the boat, and forcibly took the gun from him. As soon as he obtained possession of the gun, he observed the cock of one of the locks down, and the pan open, and found that it had just been fired off. Upon trial, he found the other barrel loaded and primed. The defendant was very abusive, when the gun was taken from him. Mr. *Hume* had the wounded negro taken up to the house of Dr. *Glover*, who lived in the neighborhood, to have the wound dressed; while the prisoner, who was opposed to it, continued to be very abusive. Dr. *Glover* then dressed the wound, after which, the negro was sent to the work

house to be taken care of by the surgeon of the establishment, Dr. *Logan*. This testimony of Mr. *Hume* was corroborated by *Wm. Vay Velcy*, another witness, who was near Mr. *Hume*, when the boat approached the landing, and when the gun was fired, and went up to Dr. *Glover's* where the negro's wound was dressed, and saw him sent off to the work-house. Drs. *Glover* and *Logan* were both sworn as witnesses, who both attended the wounded negro carefully till the first of August following, when he died, and they were both clearly of opinion, that the wound in the knee was the occasion of his death. This is the sum and substance of the testimony given against the prisoner.

After the evidence for the state was closed, Mr. *Simons*, who was counsel for the prisoner, took several exceptions in bar of the prosecution:

1st. The first exception was, that this indictment was for the recovery of a penalty of £ 700 currency, incurred under the negro act, and that the present prosecution was not commenced within six months after the penalty accrued, consequently that the cause of prosecution was for ever lost.

In order to support the first part of this exception, that this was a prosecution for the recovery of a penalty or forfeiture, he relied upon the 37th clause of the act of 1740, commonly called the negro act, which declares that every person who shall murder his own slave, or the slave of any other person, shall forfeit and pay a fine of £ 700, current money. Here he observed was a forfeiture incurred by this act, which must be recovered according to the act of limitation of 1712, or agreeably to the act of 1748, for recovering fines or forfeitures; both of which acts limit the time for commencing prosecutions for penalties and forfeitures to six months next after the penalties incurred. And in order to support the second branch of this objection, "that this prosecution was not commenced within six months after the penalty incurred," he stated, and it was not denied by the Attorney-General, that at a preced-

ing term, the prisoner had been indicted for this offence by the name of *Wm. M. Taylor*, and that a plea of misnomer had been pleaded and sustained, on the ground, that his name was *Wm. H. Taylor*. In consequence of which that indictment was quashed, and that the present indictment was not found until after the expiration of six months from the time the penalty was incurred, and therefore it was contended that the cause of action or prosecution was barred, and that the present indictment ought, in like manner, to be quashed.

After hearing the Attorney-General in reply, I was of opinion, and so decided, that this was not a prosecution for a penalty or forfeiture, but for murder, the highest offence which an individual can commit against his fellow man, as would appear by the clause of the act under which the prisoner was indicted, and the indictment framed under it. The clause of the act is in the words following: "And whereas, cruelty is not only highly unbecoming christians, but is odious in the eyes of all men who have any sense of virtue or humanity; therefore to restrain and prevent barbarity from being exercised towards slaves: Be it enacted, that any person or persons whosoever shall wilfully murder his own slave, or the slave of any other person, every such person shall, upon conviction thereof, forfeit and pay the sum of £ 700 current money, and shall be rendered, and is hereby declared altogether and for ever incapable of holding and enjoying any place of profit or trust, civil and military, within the province." "And in case such person shall not be able to pay the penalty and forfeiture hereby inflicted and imposed, every such person shall be sent to any frontier town or garrisons of this province*, or committed to the work house in Charleston, there to remain for the space of seven years, and to serve, or to be kept at hard labor."

Now it is very evident from the perusal of this clause of

* At that time, in the year 1740, there were garrisons kept up in the frontier of South-Carolina against the Indians.

the act, that the offence of murder was the one contemplated by this clause of the act, and the one intended to be punished by it; although the forfeiture of £ 700 currency, is mentioned as one of the consequences of a conviction for this heinous offence, like forfeiture of goods and chattels in England, upon a conviction for felony. By the common law, no sum is mentioned; all the goods and chattels are forfeited which belonged to the felon at the time of his conviction, more or less. By this clause, the amount of the forfeiture is specifically mentioned, and this constitutes the difference between the two cases; but in neither of the cases is the forfeiture the main object of the prosecution; they are only the consequences springing out of, or resulting from the conviction of the more aggravated offence of murder or other felony. But under this clause of the act under consideration, this forfeiture is only a part of the punishment contemplated by it, for a lasting and perpetual disfranchisement or prohibition from all offices or places of trust, civil and military, is forever declared against the prisoner; and in case of disability to pay down this £ 700 forfeiture, the prisoner is to be committed and to be kept at hard labor for the space of seven years.

And as to the indictment under this clause of the act, the Attorney General has closely pursued the end and object of the act by inserting in it two counts; one for murder and the other for manslaughter, the usual and customary counts in all cases for murder; there is nothing said about fines and forfeitures in it. And for this offence of murder, it is well known that the policy of our law has fixed no time for commencing prosecutions for this crime. The common law has wisely left it open, to be governed by times and circumstances whenever the offender can be apprehended and witnesses procured against him. No act ever passed in England for that purpose; none ever existed in this country to limit the time in such cases. The case of the late governor *Wall* in that country, who was tried, convicted and executed for the offence of murder a few years ago, more than twenty years after the offence

was committed, is a remarkable illustration of the common law principles upon this subject, and shows that there is no limitation of time for such prosecutions; and the law is the same in this country. In regard to the acts of limitations quoted, to wit, that of 1712, and 1748, they have no bearing or allusion to any case of murder or other felony whatever. The eleventh clause of the act of 1712, enacts, "that all penalties and forfeitures under any act or statute for the suing of which, by civil process, by action of debt, plaint or information, no time is mentioned, that the same shall be prosecuted within six months after the cause of action or suit given, and not after." This clause, therefore, has no relation to the commencement of prosecutions for felonies or other high crimes or misdemeanors; it relates entirely to penalties which may be recovered by civil actions or *qui tam* suits. The other act of 1748, relied on by the prisoner's counsel, limiting the time for commencement of prosecutions, for recovery of penalties and forfeitures, where no time is limited for recovery of the same, had no other object in view but the recovery of such penalties. The title of the act relates to prosecutions for recovery of penalties and forfeitures, and the enacting clause pursues the same idea, and declares that in every case where any fine or penalty or forfeiture hath been inflicted, "no information, action, or prosecution shall be commenced or carried on against the offender, for and in respect to such fine, penalty, or forfeiture, unless within six months." So that it is clear that the title of this act and the enacting clause exactly correspond with each other in the end and object of the act, for recovery of fines and forfeitures, and has not the most distant allusion to the foul crime of murder or other felony whatever, but only relates to pecuniary matters. I therefore overruled both exceptions.

2ndly. Another ground was taken also by the prisoner's counsel, that a former indictment had been given out against the prisoner, which was quashed, and there had been no regular continuances between the former and pre-

sent indictment, and a great number of authorities were read to show that in order to take a case out of the statute, regular continuances from the commencement of a prosecution to its conclusion ought to be kept up or entered. That the present indictment was not found until long after the forfeiture incurred, and after the first indictment was quashed, and long after the six months had expired, without any regular continuances whatever.

The Attorney General admitted that in civil actions or in suits for recovery of pecuniary fines and penalties, they must be commenced in time, or that there must be regular continuances, to take a case out of the statute. Not so in cases of murder, or other heinous offences. In these latter cases, if an indictment be faulty or quashed for any mistake or irregularity, an indictment *de novo* may be given out against the prisoner at any time, or if the offence prove to be of a higher nature than laid in a prior indictment, another may be given out so as best to answer the ends of public justice. But the court will always take care that a man be not twice tried for the same offence. He also contended that the time of commencing a prosecution for a criminal offence, was to be considered from the time the information was given to the magistrate of the origin and nature of the offence, and not from the finding of a bill by a grand jury, and that was within the six months, if it had been necessary to have commenced this prosecution within this time, which, however, he denied, as has been already mentioned, and often determined. After hearing arguments for and against this second objection, I overruled it, upon the grounds mentioned by the Attorney-General in reply to the prisoner's counsel, and on the authority of 3 *Williams*, 499. *Foster's Crown Law*, 104. 1 *Viners Supplement*, *Ab.p.* 2. In all which cases, it is laid down as settled law, that if an indictment be given out and found for murder or other felony, which is defective or faulty, another may be given out, so as to reach the justice of the case; but that the court will always take care that a man be not twice tried for the same offence.

3rdly. After this, another objection was taken, namely, that the act of 1740, had been repealed by the act of 1821, consequently, that no indictment could be maintained upon it.

In order to support this objection, Mr. *Simons* argued that every affirmative statute repealed a former affirmative one by implication, if contrary thereto, and produced several authorities to support that position. (1 *Black.* 89. 6 *Bac.* 373. 1 *Hale*, P. C. 297, &c.) That the act of 1821, makes the killing of a negro murder, and inflicts the penalty of death without the benefit of clergy. This act repeals the former act of 1740, by implication, which made this offence only a high misdemeanor. He then mentioned the act against horse-stealing, which made that offence felony without benefit of clergy, which had only been considered as a high misdemeanor before; in consequence, all the prosecutions in the country then depending for that offence, fell to the ground; for when a statute is repealed, the court has no longer jurisdiction of cases under it, unless there is some saving clause for the purpose of punishing the offence under the former existing law, (6 *Bac.* 372. 1 *Hale*, 290-1, 708. *Hawk.* 202. 4 *Dal.* 373. 1 *Cranch*, 110. 5 *Do.* 281.)

The Attorney-General in reply to this last objection observed, that the Legislature never could have intended or designed that murder should go unpunished one way or other, which would really follow as a natural consequence, if the construction contended for was to prevail; for the offence charged in the present indictment was committed before the act of 1821 was passed, consequently this latter act could not reach the offence; but the fact he contended really was, that this latter act did not repeal the act of 1740, either expressly or impliedly; he said he was free to admit all the cases quoted by the gentleman against him of affirmative statutes repealing prior affirmative ones wherever there was a repugnancy or contradiction; but in the present instance, he insisted there was no such contrariety or repugnancy. The act of 1821 does

not repeal the act of 1740, as to all murders committed before the day of passing that act. It is prospective in its operation, and has no reference in it to the act of 1740, or any offence under it prior to December, 1821, when it was enacted. It leaves all those offences where it found them, to be punished by the prior existing law. He then quoted *Coles* case, where the court determined that the fines incurred under the old patrol act might be enforced and collected under it, notwithstanding the new patrol law which fixes higher fines in future cases, as there was no inconsistency in the two acts.

After hearing the arguments upon this last objection, I was of opinion that the act of 1821, did not repeal the old act of 1740, but came in aid of it, and might well be considered as an amendment of it rather than a repeal; and this I think will appear obviously clear and certain, by a brief review of it. The title of this last act of 1821, is "An act to increase the punishment inflicted on persons convicted of murdering any slave, and for other purposes therein mentioned." The enacting part then goes on and declares, "that if any person from and after the passing of this act shall wilfully, maliciously, and deliberately murder any slave within this state, such person shall, on conviction, suffer death without benefit of clergy." Nothing then can be clearer to my view of the subject than that this act was prospective in its operation, extending only to cases happening after the passing of the act, and cannot by any possibility be construed to extend to cases coming under the purview of the old law of 1740. It has no relation to this old act, nor is there any thing in it repugnant to, or inconsistent with it; they both relate to the punishment of the heinous offence of murder, although they differ in the degree of punishment for the same crime. The old law punishes the offence with fine, disqualification from office and places of trust, and seven years imprisonment at hard labor. The last law punishes the same offence, upon conviction, with death, without benefit of clergy. The two acts are entirely independent

of each other, and steer clear of each other without collision, as to all cases before the year 1821. The act against horse-stealing, which was quoted by the prisoner's counsel, and so much relied upon, contained an express clause repealing all former acts by name and description, which had ever passed in this state against that offence ; so that they were all expunged from the statute book. But the act of 1789, then passed, which made that offence felony, without clergy ; and therefore it was, that all the prosecutions for that offence fell to the ground ; because, after the passing of the act of 1789, there was no existing law to punish the offence in the intermediate time between the commission of the offence and the passing of the new law. Not so in the present case ; there is no express repeal of the old law of 1740 ; it remained in full force to punish all offences against it, till the act of 1821 was passed into a law, which is prospective in its operation. *Coles case*, quoted by the Attorney-General, has, in my opinion, settled the law in this state. There, the fines and penalties which had been incurred under the old patrol law of 1746, were permitted to be recovered under it, notwithstanding there was a clause in the new patrol act of 1819, repealing all former acts repugnant thereto ; because the clause in the new patrol act did not prevent the recovery of the fines under the old act nor did they consider such recovery as repugnant to the terms of the new law. So, in like manner, I am of opinion that the punishment of an offender, under the old act of 1740, for murder, is not repugnant or inconsistent with the act of 1821, and that it would in this case be a denial of justice to refuse to let the case go to a jury of a country upon its merits. The cause then went to the jury upon the evidence offered in support of the prosecution, and the jury, without the smallest hesitation, found a general verdict of guilty, which convicted the prisoner of the offence of murder. A motion for a new trial and in arrest of judgment was then made, and the cause has been brought up to this court, where all the foregoing legal points have been fully dis-

discussed and investigated over again, and the court, after mature deliberation, are of opinion that all the legal exceptions taken on the trial in the Circuit Court below, were correctly overruled upon principles of law, and that the present motion should be dismissed.

Simons, for the motion.

Petigru, Att'y Gen. contra.

The Adm'ors of *HYNMAN* vs. *WILLIAM WASHINGTON*.

On a rule against an attorney for not paying over money to his client, it will be discharged, if it appear that *ex æquo et bono*, he is not entitled to it.

IN this case, a rule had been served on the attorney of the plaintiffs to show cause why he did not pay over to the plaintiffs the money which had been collected on the judgment obtained. He showed for cause that Mr. *Guignard* directed him to commence an action of debt on a judgment, then unsatisfied, against the said *Hynman*, who, on being so informed, requested the attorney to put in suit a bond executed by *Washington*, and payable to the said *Hynman*, and out of the money to be made in such suit, to pay Mr. *Guignard*. The attorney having procured a written order to this effect, proceeded against *Washington*, obtained judgment and received the amount thereof, and paid over to *Guignard* the amount of his judgment, with interest. The plaintiff did not deny having given such order, but contended that *Guignard* was not entitled to more than the amount of his judgment, and that interest had been improperly paid. The rule was discharged by the judge, and a motion was now submitted to reverse that order.

Mr. Justice *Huger* delivered the opinion of the court :

This was an application to the discretion of the judge ; in the exercise of which, he was to be governed by the circumstances of the case. If *Hynman* was not, *ex æquo et bono*, entitled to the money, the rule was properly discharged and he left to his action at law for his remedy, if he had any. It is clear that had an action of debt been commenced against *Hynman*, *Guignard* would have obtained a judgment for interest as well as principal. It was to accommodate *Hynman* that *Guignard* did not sue.— He ought, therefore, *ex æquo et bono*, to be placed where he would have been, had he not complied with the proposal of *Hynman*. The whole arrangement was proposed and made for the indulgence of *Hynman*, he ought not to complain, having obtained his object, that *Guignard* is no loser.

The motion is discharged.

Justices *Nott*, *Johnson* and *Colcock*, concurred.

Gantt, Justice, dissented.



JEHU JONES, jun. vs. LAVINIA JENKINS, Ex'rx of ARCHIBALD WHALEY.

An estate is not bound by the unauthorized act of the attorney of an executrix.

Colleton, Spring Term, 1823.

THIS was an action of assumpsit on a note, dated January 18, 1815, and drawn by *Archibald Whaley*, the defendant's testator. Four years and eleven months after it was due, the plaintiff applied to a brother of the executrix, who occasionally transacted her business, for payment. He replied that it should be paid. The defend-

ant pleaded the statute of limitations, and the only question was, whether the promise of the brother was sufficient to defeat the plea. The judge on the circuit was of opinion that it did not; a motion was now made to reverse that decision.

Mr. Justice *Huger* delivered the opinion of the court:

In this case, it is important whether the executrix could or could not have bound the estate by a promise made by herself; for there is no evidence that she did promise to pay the note in question. Her brother had no written authority to act for her, and it does not appear that he had ever so acted for her in any previous case. If he had, and his act had been afterwards confirmed by her, there would have been such evidence of his authority as ought to have been submitted to a jury, but as there was no evidence of any authority vested in the brother to bind the estate, the non-suit was properly ordered, and the motion in this case must be discharged.

Justices *Nott*, *Johnson* and *Richardson*, concurred.

Holmes, for the motion.

Ford & De Saussure, contra.



THE CITY COUNCIL OF CHARLESTON, vs. JAMES ROGERS.

A city ordinance requiring the measurement of coals by an inspector, when sold within the city, is not repugnant to the constitution of the United States, although the inspector be allowed a fee by the ordinance.

A suit was brought in the City Court to recover the penalty for selling coals within the city, contrary to a city ordinance, passed on the 22nd of August, 1810. The 5th section of the ordinance enacts, that coals shall be deliver-

ed to the purchaser by the ton which shall consist of 2240 lbs. that the said coals shall be measured in a certain manner by the inspector of the city, at the expense of twenty-five cents a ton, to be paid to the inspector by the seller ; and if any coals be sold contrary to the provisions of the ordinance, it imposes a fine on the seller equal to the value of the coals so sold. The coal in question had been imported from the Kingdom of Great Britain, and was sold by the defendant without having complied with the conditions required by the ordinance. The defendant contended that the fee allowed to the inspector by the ordinance was a duty or impost on imported coal, and, therefore, could not be collected ; as by the 10th section of the 1st article of the Constitution of the United States, no state is permitted without the consent of congress to lay any import or duty on imports or exports, except what may be necessary for executing its inspection laws. The city attorney, in reply, contended, that the fee allowed to the inspector was not a duty or impost within the meaning of the constitution, and if it could be regarded as such, it comes within the exception, and was a duty necessary to the inspection of imported coal. The recorder decided in favour of the defendant, and the city attorney now appealed from that decision to this court.

Mr. Justice *Huger* delivered the opinion of the court :

Before I proceed to the consideration of the principal question made in this case, I must observe that this suit was not brought to recover the fee allowed to the measurer, but for the penalty imposed for selling coal without having had it measured, as required by the ordinance. If the only objection to the ordinance be the supposed unconstitutionality of the fee, the city council had the power to require the measurement of the coal in the manner prescribed, and the defendant was so far bound to comply. He might afterwards, if he pleased, have contested the payment of the fee. The great object of the ordinance was the measurement of the coal, not the payment of the fee. It would

be going great lengths to declare an act void, only because an unimportant provision of it was unconstitutional. This court has frequently decided differently. Were I, therefore, satisfied that the fee was unconstitutional, I should not conclude that the suit for the penalty could not be supported, unless the power to require the measurement of coals be also unconstitutional. The constitution nowhere directly prohibits the measurement of coal by a state; if, therefore, the exercise of this power by a state be not incompatible with some power given to congress, it must be constitutional. The only power with which it can be supposed to conflict, is the power of regulating commerce. The words of the constitution are, "congress shall have power to regulate commerce with foreign nations and among the several states." Here no power is given to regulate commerce between citizens and residents of the same state. The ordinance nowhere prescribes regulations for any commerce which may be carried on between this city and a foreign nation, or with another state. It is expressly limited to citizens and residents of the city. It does not therefore interfere with the power of Congress in this respect. If the city has the power of regulating commerce between its citizens, it must have the power of enforcing those regulations. Had the ordinance, therefore, not prescribed the fee to which the inspector was entitled, it would have been constitutional, and if that part which does prescribe the fee be unconstitutional, the other provisions are constitutional and binding, and the decree ought to have been for the plaintiff. I shall now enquire, if the fee prescribed be inconsistent with the constitution. The 10th section of the 1st article, in plain terms, prohibits a state from laying any impost or duty on imports or exports, except such as are necessary for executing inspection laws. Here two questions arise:

1st. If the fee in question be a duty or impost within the meaning of the constitution, was not the ordinance, so far as the coals are concerned, an inspection law?

2dly. If the ordinance be not an inspection law, is it

therefore unconstitutional? The constitution no where declares what is an inspection law ; we are therefore left to its general signification for the meaning of the term.— Its literal signification would include imports as well as exports. If articles exported are inspected to enhance their value and facilitate their sale abroad, articles imported may be inspected to fix their value and prevent imposition at home ; and in a commercial city, where so many of the articles imported are again exported, it would appear as important to inspect such as are proper for inspection when imported as when they are the growth or manufacture of the state. When the articles imported have been already inspected at the place of shipment, a further inspection may be unnecessary ; and the reason I apprehend why the inspection of imports is not more generally provided for, is the now general practice in the different states of subjecting to inspection most articles of domestic growth and manufacture. This practice, though very much increased in the last five and twenty years, is not yet universal. In the very ordinance under consideration, provision has been made for the inspection of beef and pork imported into this city, which has not been before inspected. That articles imported may be subjected to inspection laws, appears not only from the policy of trade and the ordinance in question, but from the very words of the constitution itself. The 2nd article of the 10th section declares, that “ no state shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws ;” “ and the nett produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States.” Here, no state is permitted to lay any impost or duty, but to enforce its inspection laws ; and the impost or duty laid on imports as well as exports, is to be paid into the treasury of the United States. From this phraseology, it appears evident that imposts as well as exports, may be inspected within the meaning of the Constitution.

If any articles imported can be inspected, I cannot undertake to decide that coals ought not. Quantity as well as quality is an object of inspection, and it may contribute as much to the convenience of the citizens of this place, where coals are used very generally for fuel, to have an inspection of them, as of beef, or pork, or bread, or any other article. On this point, the ordinance itself is very conclusive; it was passed by those who were best acquainted with the wants of the community, and who were elected by the people for such purposes; and it is to be observed that their judgments could not have been misled by their cupidity, for no revenue was derived from inspection. I cannot however deem it material to this case, that the ordinance in question should be regarded as an inspection law. Although a state cannot lay a duty or impost on an import or export, it has not yet been denied that it can tax those living within its jurisdiction, nor has it been supposed unconstitutional in a state to punish offences against its laws. The ordinance in question does not even pretend to tax the transfer of coal from hand to hand, it only requires that when transferred, it should be measured in a particular way. The fee allowed the measurer is not a tax or duty, or impost, it is but a small remuneration for labour performed. Wood, lumber, and many other articles are subjected to the same regulation. Is it not as much a duty on exports to require that wood and lumber should be measured, as it is an impost on imports to require coals to be measured? Taxes, duties, imposts and excises, are words not without meaning; it is to be regretted, however, that when used in the constitution to give or take away power, they were not more clearly defined. Congress have power to lay and collect taxes, duties, imposts and excises by the 5th section. By the second article of the 10th section, the states are prohibited laying on any imposts or duty on imports or exports; no where, however, has the power to lay and collect taxes and excises been taken from the states; but the general government alone can lay and collect duties and imposts upon imports,

By the 5th article of the 9th section, the general government is prohibited from laying a tax or duty upon exports. From these and other limitations in the constitution, it appears that the state governments are not entrusted with the power of doing any act to affect the intercourse between the different states and between either of them and a foreign country. Had they been permitted to interfere in such matters, confusion and war must have been the result, and all intercourse with foreign nations would have been precarious, if not entirely destroyed. We should not have been as one nation to foreigners, but as many, and the happiness of the whole would have been prostrated at the feet of a capricious and imbecile state sovereignty. It was, therefore, wisely left exclusively to the general government to lay and collect duties and imposts on imports from foreign countries. But no more power is here given than is necessary to the attainment of the object in view. To tax or lay a duty on exports is not given, because it was not necessary to our intercourse with foreign nations, and might and probably would lead to sectional preferences, and excite local jealousies. Neither can a duty or impost be laid by the general government on goods imported from another state. This power was not necessary to the attainment of any object for which the general government was formed, and would have been liable to the same abuses with the power of laying duties and exports. The general government has been entrusted with such powers as were necessary to the management of our exterior or international concerns; and with some others essential to general or national convenience, as to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; to establish post offices; to promote the progress of science by securing to authors and inventors the exclusive right to their writings and discoveries, &c. &c. all which powers would have been worse than useless in the possession of the states. Independent, however, of these great objects, there are very many others of a local nature, in which the people could not but be extremely interested.

For the attainment of these, the state governments were established and so constituted as to answer the purposes for which they were intended. It was not, however, to be expected that in apportioning the sovereign power of the nation between these different agents, the general and state governments, that it could be so exactly decided, and each part so distinctly defined as to preclude the possibility, or even probability of their occasionally interfering. Among the exact sciences, politicks cannot be ranked. It was impossible not to give to each to enable it to perform its proper functions, powers which were required by the other. The general government, in pursuing its legitimate course, will sometimes be in collision with the state governments, when pursuing theirs. It is certainly in the power of each, very materially, to advance or retard the operations of the other; and as the constitution itself was the result of conciliation and compromise, so in the same spirit ought it to be administered. Both governments are the agents of the same people, who will take care that their interests are not sacrificed at Washington or Columbia. As the general government has charge of our general and international interests, and the state governments of our local and social interests, the constitution must be so construed as to give to each the power of performing its appropriate duties. That they have an indirect bearing upon each other, and may sometimes interfere, can be no objection to the exercise of a power by either, though neither can have a power directly to destroy what the other has a power to create. Each may indirectly interfere with the other when both are acting within their acknowledged limits. Both for example may levy a land tax. In doing so, however, contemporaneously, they indirectly interfere with each other. In this case, they exercise an identical concurrent power, but this may occur when exercising powers not identical.—The general government, for example, has established a bank; the states can tax income, and include therein the dividends of the United States' Bank. A tax on income

would thus, indirectly, interfere with the power of the general government to establish a bank. Indeed, all the powers retained by the states for internal purposes, may, in their operation, indirectly affect their exterior relations. To the harbour-master's department, vessels foreign as well as our own, are subjected, and for his interference, a fee is charged and paid by all vessels. Pilotage is under the control of the state governments, and yet both may be so managed as to interfere very much with our foreign as well as coasting vessels. The state has power to regulate contracts, and in so doing, may affect, very materially, our commercial intercourse with the other states and with foreign countries. A watch which is imported, and pays a duty to the general government, may be taxed by the state when here, and yet the tax laid may be so high as to prevent, in a great degree, the importation of watches.— All sumptuary laws, as well as all regulations with respect to our markets, interfere indirectly with foreign commerce, and commerce between the states. Our quarantine laws, our vendue taxes, and many others of long continuance, do so likewise. To assume then as a position that any act is unconstitutional, which may indirectly interfere with the exercise of some power confessedly granted to Congress, would be to annihilate the state governments altogether. But that such was not the intention of the people when they adopted the constitution, or of the convention when they formed it, I think cannot be doubted. Such a construction is not only inconsistent with the avowed object of the constitution, but if adopted, must lead to the destruction of the government itself, for it does not follow, because the states do not possess certain powers, that the general government does. If, therefore, all those powers not given to Congress, which, when used by the states, would indirectly interfere with the powers given to Congress, are not in the states, they can be exercised by no one; and as this class of powers is large, and essential to our local interests, we should be without a government in so many essential respects as would render ne-

ecessary an appeal to first principles, and to the legitimate source of all power. Although I must conclude, that the possible remote interference of a power exercised by a state, with a power vested in Congress, does not make it unconstitutional, I would not be understood as contending for a power on the part of a state to control the exercise of power by the general government. If it appear from the act of a state that the object is to counteract, (or that it really does,) power constitutionally vested in Congress, the act is void ; for a state government (no more than any other agent) will not be permitted to accomplish indirectly what it is not permitted to do directly. In other words, it cannot use power under the cover of false pretences. *Sic utere tuo ut non alienum laedas*, is as true with regard to states as to individuals. The power given to each must be so used as to interfere as little as possible with the powers given to the others. I conclude then that the possible indirect interference with commerce which the fee allowed to the measurer may produce, as well as the measurement itself, is no ground for declaring the ordinance unconstitutional. I am of opinion, therefore, that the decision of the City Court ought to be reversed.

Justices *Johnson*, *Nott* and *Richardson*, concurred.

Gantt, Justice, dissented.

Toomer, for the motion.

Prioleau, contra.

McFEE & CALDER vs. SOUTH-CAROLINA INSURANCE
COMPANY.

The courts here will not notice the revenue laws of a foreign country. Clearing out for a neutral, with the intention of sailing for a belligerent port, will not avoid a contract of insurance.

If a voyage be defeated by one or more of the perils, enumerated in the contract of insurance, the insurer may abandon and recover as for a total loss.

THIS was an action on a policy of insurance for 214 bales of cotton, valued at \$27 50-100 per bale, shipped per the Swedish ship *Crown Prince*, at and from Charleston to Portsmouth, in Great-Britain, and thence to the river Medway or river Thames, with liberty of transshipping the same at Portsmouth or Chatham for London, by a regular coasting vessel. The policy bore date the 30th of April, 1812, and the premium was 8 per cent. on \$5,885. It was written on the policy that the invoice was on account and risk of British subjects residing in Great-Britain, but was the property of *McFee & Calder*, the plaintiffs. It appeared in evidence that the vessel sailed for Charleston on the 6th May, having cleared for Antwerp; that the clearance was published in the daily papers of the city four days before the policy was signed. That her bill of lading stated that she was bound for Falmouth, and the cotton was to be landed at London, and was consigned to *Dennistown, Buchanan & Co.* It was dated on the 2d May, 1812. The invoice was dated the 28th April, and was on account and risk of *Dennistown, Buchanan & Co.* The protest was signed by one *Christian Henneburgh*, as captain. It was adduced in evidence and set forth among other things, that they experienced gales and heavy seas on the 13th, 15th and 17th. On which last day, at half past 3 o'clock, they found six feet water in the ship's hold; they set both pumps at work and freed her. Found she made twelve inches water in fifteen minutes; that the crew refused to proceed on the voyage, and it was concluded, for the preservation of their lives and of the ship, to bear away for port; that they kept one pump at work constantly, and on the 20th anchored in the Hudson river, and had her surveyed.—The plaintiffs then adduced the examination under commission of the surveyors, who found, *inter alia*, at suc-

extensive examinations, that her upper works were open and required calking; that one of the starboard fore-shrouds was stranded; that the scarf of the kelson was open and split about 18 inches from the heel of the foremast abaft; the chain bolts of the main channels on the larboard side worked loose; some of the sheathing of the stern gone; they then recommended that she should be hove keel out, which being done, they found her false keel entirely shattered from stem to stern; her sheathing considerably worm eaten, and the sheathing nails so much rusted as to be unsafe for her to proceed to sea without having her bottom calked. They found her foremast about one foot below the hounds very rotten, and totally unseaworthy; also, the heel of the foretopmast very rotten and unfit for use; likewise, two cross trees broken; the bowsprit was also defective and rotten, and the foretop and trussel trees in a similar situation. The plaintiffs, upon hearing that she had put into New-York, offered to abandon to the company, by letter dated 9th June, 1812, inclosing a letter from Mr. *James Boggs*, of New-York, who was agent for the underwriters at *Lloyd's*, to *H. Bryce*, who was the Charleston agent of the ship owners, in which Mr. *Boggs* stated, that a few days before the *Crown Prince* sprung aleak, she was boarded by the British ship of war *Recruit*, Captain *Senhouse*, and on account of the cotton not being included in the licence, as well as from a doubt of her true destination, an officer was put on board, with directions to libel the ship on her arrival in England; that he (the writer) had written to England to procure a licence for the cotton, but he added, as she could not be safely hypothecated, the cotton must be sold to repair her. The examination of Mr. *Boggs* was then adduced, which established, among other things, that the ship having sprung aleak, put into New-York with a British midshipman on board, who had orders to libel her in England for carrying cotton without a licence; that the cargo consisted of lumber and 300 bales of cotton, 214 of which were shipped by the plaintiffs. The repairs of the ship

amounted to \$ 5,572 23. To reimburse the witness these repairs, the cotton was sold and brought altogether \$ 7038 06 nett. The 214 shipped by the plaintiffs brought \$ 4819 54. In the opinion of this witness, the political state of the country had its influence in determining the captain to sell the cotton. He proved that by the navigation laws of Great-Britain, cotton, the produce of the United States, could not be imported into that country in a Swedish vessel. The defendants resisted the claim upon the ground, that the ship was proved to be not seaworthy when she sailed. That if she had been, yet she was not properly documented, as she wanted a licence to import cotton, the produce of the United States into Great Britain in a Swedish bottom. That her papers were moreover irregular and contradictory, and had actually subjected her to detention, particularly her clearance which was falsely for Antwerp. That the concealment of this false clearance and the want of the licence for the cotton, were very material and vacated the policy ; that at any rate the Insurance Company were not liable for a total loss, only a partial one, as the plaintiffs under the circumstances had no right to abandon.

To prove such of the facts as were necessary to their defence, the defendants produced the examination of Captain *Silliman*, who denied the existence of the storms, described by the captain and of Mr. *Mathews*, a passenger in the ship, in that voyage. These witnesses contradicted the protest in important particulars, especially Mr. *Mathews*, who testified that the ship met with no tempestuous or any such weather as would have done harm to a staunch vessel, and that he had twice crossed the Atlantic in vessels that made as much water as the *Crown Prince*, when she went into New-York.

The plaintiffs in reply examined several witnesses who were of opinion that it was customary to procure a licence for landing the cotton after it had arrived at an out-port in Great-Britain; that false clearances were not uncommon, and were intended to deceive belligerents and diminish

the risk. Several captains of ships, and one ship carpenter were examined, and who were of opinion, on having the surveys read, that she must have been seaworthy when she left Charleston.

Here the case closed, and was argued upon the grounds taken by the defendants, and the plaintiffs claimed a verdict as for a loss by general average.

The presiding judge in his charge to the jury told them that he knew no law prohibiting the trade insured; that he saw no reason why a licence should be adduced before entry into a British port, and the evidence of the course of trade, he thought, established it to be unnecessary; that the question concerning the false clearance was one for the jury to determine, and that the evidence had proved it conformably to the usage of trade; that the object clearly was to evade a search by a belligerent, but that if it increased the risk at the time the contract was made, the policy was void. It appeared to him, however, that the defendants knew or should have known that under the usage of trade it was a risk to be encountered, and he thought it in fact lessened the risk, or it would not have been done; that there was no concealment, as the defendants knew the voyage was to Portsmouth, notwithstanding the clearance to Antwerp; that with respect to the partial or total loss, the true question was, was the voyage defeated by one or more of the perils of the sea, covered by the policy? If so, the plaintiffs were entitled to recover; that selling the cotton in New-York was the best mode by which the repairs could be paid for, but there was no evidence that the lumber was sold for the repairs of the ship, and he believed the truth to be, that it could not be shipped, because the war prevented it. That with respect to the question of seaworthiness, he was of opinion upon the facts and testimony, that the vessel was unseaworthy; that the extent of the repairs she had required was a strong circumstance to show what her situation must have been prior to a storm, which he could not think had been very serious, and to which therefore so much in-

jury could not be fairly attributed ; he left it to them however to decide whether she was seaworthy or not.

They found for the plaintiffs.

A motion was now made to set aside this verdict.

Mr. Justice *Huger* delivered the opinion of the court :

In this case, four questions have been made for the consideration of the court :

1st. Was it incumbent on the insured to procure a licence or order in council for the landing of the cotton in England before the Crown Prince reached Portsmouth ?

2nd. Was the clearing for Antwerp, when her destination was Portsmouth, sufficient to avoid the policy ?

3rd. Under the circumstances stated, are the insured entitled to claim as for a total loss ? and,

4th. Is the finding of the jury conclusive on the seaworthiness of the ship ?

I shall consider the questions in the order they have been stated ;

1st. As to the licence. It is very clearly established that the revenue laws of Great-Britain prohibit the importation of all produce, the growth of a foreign country, but in vessels of such country, or in British bottoms. It is equally clear that the cotton insured was the growth of the United States, and that the Crown Prince was a Swedish vessel. The defendants then undertook to insure a voyage which they must have known was prohibited by the laws of Great-Britain. Whatever then be the risks of such a voyage, the defendants undertook to indemnify the plaintiffs in the event of a loss by either or all of them.— They cannot now be permitted to defend themselves on the ground of the illegality of such a voyage. We are not here to enforce the revenue laws of another nation.— Had this contract been in derogation of our own, we must have declared it void. The penalty imposed by Great-Britain for a breach of her laws may be enforced there, and the liability to such a penalty there, is a risk which may be legally insured against here. I do not, however

understand the defendants to go this length. They only contend that the revenue laws of Great-Britain form a part of the usage of the trade between that country and this, which are supposed to be known to the contracting parties, and with reference to which, the policy is to be construed, and they insist that although the cotton in question was generally prohibited by the revenue laws of Great-Britain, yet, that it was the established usage to admit it to entry, whenever a licence to do so had been procured prior to the shipment; but of such a usage, they have furnished no evidence. It appears indeed that the lumber shipped with the cotton was protected by such a licence; but this lumber was clearly intended for the government of Great-Britain, and the licence was probably given as an inducement to the merchant to contract on better terms for the government. But independent of the peculiar circumstances attending this licence, its singularity is sufficient to repel the idea of the pretending usage. All the witnesses examined on this point prove (if they prove any thing) that the usage was to procure a licence or order in council after the arrival in Great-Britain. If therefore the policy was made with reference to any usage, it was to that of which these witnesses speak, and the understanding of the parties was, that a licence was to be obtained on the ship reaching Portsmouth. As she never reached her destination, a licence or order in council for landing the cotton could not be procured. The insured, therefore, did not omit to do any thing that it was incumbent on them to do. On the first ground then, the appellants must fail.

On the second ground, it has been contended that the clearance for Antwerp, when she was in fact to sail for Portsmouth, was a material concealment, and enhanced the risk, and consequently discharged the underwriters. All the witnesses examined prove, that it was customary to clear out for a neutral, when destined for a belligerent port. The object was to diminish, not increase the risk of capture. The French decrees had interdicted all trade

between neutrals and the British isles, and Britain had retaliated. Any means which were calculated to evade these outrageous and unjust restrictions were permissible, and a clearance from a neutral to a neutral port, was not only a justifiable, but in many instances an effectual shield against lawless violence. That this was the only object is unquestionable ; that it diminished the risk of capture by French cruizers, I have no doubt ; that this was so understood by the defendants themselves, appears from the usage proved ; and that they knew of it, appears not only from the usage proved, but from the publicity given to the course she was about to pursue. It was published in the daily papers of the city, days before the policy was effected, that she had cleared for Antwerp, and yet they insured her voyage to Portsmouth. But whether such a clearance increased or diminished the risk, was a question of fact for the jury ; they were so told ; they found for the plaintiff, and in so doing, have decided, that, in their opinion, the risk was not increased. In *Planche and another vs. Fletcher*, (*Doug.* 238,) Lord *Mansfield* lays down the same doctrine. On the second ground, therefore, the defendant must also fail. The third question has been embarrassed by considerations not necessary to its solution. Unquestionably, a voyage may be defeated by causes not covered by the policy, in which case the underwriters would not be responsible, and it is equally true that the plaintiffs could not at pleasure convert a partial into a total loss. They can only recover as for a total loss by shewing that the voyage insured has been defeated by one or more of the perils enumerated and included in the policy ; that the voyage was defeated in this case, is unquestionable. The cotton was shipped here, and was to have been landed in Portsmouth, where it never got. The next enquiry is, by what causes or perils was the voyage defeated ? It is clear that the Crown Prince was obliged to put into New-York in consequence of springing a leak in a gale of wind or swell of the sea. The repairs required were very serious, and must have occu-

plied much time. There were no less than five different surveys. When she arrived in New-York, does not exactly appear. It was I presume about the 23d of May, for on that day, the first survey was had, and the surveyors were then of opinion "that her upper works were open and required calking, and that she should be lightened of her cargo in part or the whole, as the case may require, to find out the leak without heaving the vessel down." On the 5th of June, the second survey (B.) was had; the leak had not then been discovered, for the surveyors say among other things, that the sheathing of her stern was gone, and the main leak not being yet discovered, it was necessary, in their opinion, that she should be hove keel out. On the 10th of June, the third survey (C.) was had, and it was discovered, say the surveyors, that her false keel was entirely shattered from stem to stern; her sheathing worm eaten, and her nails so much injured as to render it necessary that she should be calked. On the second of July, the fourth survey (D) was had; when further defects were discovered; and on the 15th of July, the fifth and last survey was had, when still further defects were discovered. From these different surveys, it appears that the defects were not discovered at once; that her repairs were commenced before the extent of them was ascertained, and that it was not until after the 15th of July, she could have re-shipped her cargo.—Long anterior to her arrival in New-York, the embargo act had been passed, which prevented all American vessels from sailing. The cotton, therefore, from the day of its being landed in New-York to the 18th of June, when the declaration of war took place, could not have been transhipped in an American vessel, and from the provisions of the embargo act, the cotton could not have been shipped in any other neutral vessel pending that embargo, if one could have been found. Under these circumstances, the only mode of forwarding the cotton appears to have been the one attempted by the captain, to repair his ship and proceed on his voyage. For these repairs, he

applied to Mr. *Boggs*, and to repay him, the cotton of the plaintiff was sold. In selling this cotton, however, the captain appears to have done only what the necessity of the case imposed on him. For it appears from *Bogg's* testimony, that the vessel and cargo could not be hypothecated from the uncertainty of her fate, when she should arrive in England, as well as from the political complexion of the times.

The embargo then appears to have been a sufficient cause for not procuring a vessel for the transportation of the cotton after its arrival in New-York; and before the *Crown Prince* was repaired, the declaration of war prevented her carrying it. The voyage was then defeated, first, by the leak she sprung at sea; second, by the embargo; and lastly, by the war; and all these perils are covered by the policy; the first under "the perils of the seas," and the last two under "all restraints and detentions of all kings or people of what nation, condition, or quality soever." On the third ground, therefore, the motion must also fail. I was of opinion on the trial of this case below, that the *Crown Prince* was not seaworthy when she left the port of Charleston. I have since seen no cause to change my opinion. The court however regard it as a question for the jury, and they will not disturb the verdict on that ground.

The motion is therefore discharged.

Justices *Johnson*, *Nott* and *Gantt*, concurred.

Prioleau, for the motion.

Simons, contra.

JOHN H. SARGENT, Assignee of ROBERT BLAKELEY, vs.
JOHN L. WILSON.

The court may, at discretion, under particular circumstances, permit the defendant's attorney to enter an appearance and move to set aside a judgment by default after the second day of the next term

IN January Term, 1823, for Charleston district, on motion of *Simons & Warring*, it was ordered, that they be allowed to enter an appearance and plead in the above case. From this order, the plaintiff appealed on the ground that it was neither consistent with law, nor with the practice of the court.

Mr. Justice *Gantt* delivered the opinion of the court:

The rule of court requires that applications for setting aside orders for judgment shall be made on or before the 2d day of the next term. The motion in this case was not made within the time prescribed, but ten days afterwards, though within the term. It frequently happens that from various causes, attorneys who have been regularly employed to appear and defend actions, omit to enter their appearance within the time prescribed by the rule of court; and it is the practice of the court, where it can be done without injury to the plaintiff, to permit the omission to be corrected by ordering an appearance to be entered, *nunc pro tunc*; always, however, on a satisfactory statement or affidavit, shewing that the omission was casual and unintentional. In this case, the application was supported by a strong affidavit of *Edward P. Simons*, Esq. stating that *John L. Wilson* had instructed him to appear in this action; that he forgot the case until he understood that an order for judgment had been taken, and the case about to be put on the writ of enquiry docket; that on examination made, he found that he had omitted to enter an appearance. There was a substantial defence. The court are of opinion that the discretion was properly exercised in this case, in allowing the attorney of the defendant leave to appear and plead to the action. The motion of the plaintiff to reverse the order below, must fail.

Justices *Richardson*, *Huger*, *Johnson* and *Nott*, concurred.

THEODORE GOURDIN vs. JOHN N. DAVIS and THOMAS
LEHRE.

The plaintiff agreed to rent to the defendant Nelson's Ferry, with 200 acres of land for \$800 per annum. After a particular description of the land leased, there was a covenant on the part of the lessor to furnish one half of the laborers necessary to erect a bridge across a creek near the landing, and to assist in opening a road for two miles. Upon an action being brought for the rent, the court *Held*, that the covenant to build the bridge and make the road was not a precedent covenant; but that the covenants were independent.

Charleston district, January Term, 1823.

Covenant.—Tried before Mr. Justice *Gantt*.

THIS was an action of covenant, founded on an agreement between *T. Gourdin* of the one part, and *John N. Davis* and *Thomas Lehre* on the other part; whereby the plaintiff agreed to rent to the defendants the place called Nelson's Ferry, with about 200 acres of land. After a particular description of the land intended to be embraced by the lease, there was a covenant on the part of the lessor, *Gourdin*, to furnish one half of the labourers necessary to erect a bridge across Eutaw creek, and to assist in opening a road for two miles. This covenant concluded as follows: the "object being that the said road and bridge be at the joint and equal expense of the two contracting parties."

The defendants undertook on their part to give and pay for the use of the said ferry and land for the term of ——— \$800 annually, in quarterly payments, one fourth at the expiration of each three months.

The action was brought to recover for the breach in not paying the rent agreed on.

The defendant pleaded that the covenant to build the bridge and road, constituted a condition precedent to the agreement to pay rent.

The plaintiff demurred, and judgment was given for the plaintiff in demurrer.

The defendants appealed on the ground, and insisted that from the very nature of the contract, the road

and bridge were essential to the full enjoyment of the ferry, for which rent was to be paid.

Mr. Justice *Gantt* delivered the opinion of the court :

The main object of this agreement, and which is expressed in the beginning of the instrument, is to lease the ferry and 200 acres of land. The lessees covenant to pay for the enjoyment of the same, \$800 per year, and it is expressly stated that the \$800 is to be paid for the ferry and the lands. Incorporated in the body of this agreement, is a covenant for erecting a bridge and clearing a road. This covenant does not appear to have any necessary connexion with the lease of the ferry and land, and certainly forms no part of the estimate for which rent is to be paid. Besides, the tenor of the covenant in respect to the road and bridge is, that it shall be at the equal expense of the contracting parties. There is no specification as to the time when the work is to be done. The plain and obvious sense then of the agreement is, that for the ferry and lands, the defendants were to pay annually \$800 rent, and that a road and bridge were to be made at the equal expense of the contracting parties. Why this work was not done ; whether it proceeded from a default on the one side or the other, does not appear, nor is there any averment that the defendants were ready and offered to perform their part of the work, and that the plaintiff had failed on his part to comply with what he had undertaken. The covenants in this agreement are mutual, independent covenants affording to each of the contracting parties a right of action for a breach by the other. The court are unanimous in the opinion, that the covenant pleaded does not constitute a condition precedent to the payment of the rent agreed on. The motion to reverse the decision made in this case must fail.

Justices *Richardson*, *Huger*, *Johnson* and *Nott*, concurred.

Hunt, for the motion,

———, contra.*

Administrator of T. HOWELL vs. SAMUEL SMITH.

Taking possession of assets, and paying the debts of the deceased out of them, will make a person executor *de son tort*. And upon the administrator bringing an action for such assets, such disbursements will not be allowed in discount.

Georgetown, April Term, 1823.—Tried before Mr. Justice *Gantt*.

THIS was an action for money had and received. It was proved that the defendant on the death of the intestate possessed himself of two hundred and fifty dollars, money belonging to the estate of the deceased. In the defence made to this action, it was shewn that a paper was found in the trunk of the deceased, which purported to be a will made by the deceased, wherein the defendant was nominated an executor. A question was made on the validity of this paper as a will, which terminated in a decision of the Constitutional Court that it was no will. Before the decision thus made, the defendant disbursed certain moneys on account of the estate as executor, and it was insisted in his defence that the sums thus paid away should be discounted from the sum which had been received by the defendant, belonging to the estate. The court was of opinion that the defendant was not legally entitled to the discount set up, and so instructed the jury, who found accordingly. The motion made for a new trial rested on the following grounds:

1st. That the defendant acting as agent for the estate, was authorized to pay for such services as were necessary for the benefit and preservation of the estate, and that he should have been allowed to show that such was the character of the services mentioned in the discount.

2nd. That in this action, the defendant was entitled to all the equitable rights of the persons whom he had paid, and should have been allowed to establish their claim.

3rd. That the defendant should have been allowed the sums paid to counsel for endeavouring to establish what

was evidently the will of Mrs. *Howell*, though not technically executed.

4th. That the verdict of the jury was not warranted by the evidence, as there was no evidence that the defendant received more than two hundred and fifty dollars, and it was conceded he had paid to the plaintiff, ninety-three dollars and seven cents.

Mr. Justice *Gantt* delivered the opinion of the court:

The paper which purported to be the will of Mrs. *Howell*, having been adjudged not to be her will, the defendant could not justify under it an interference with the assets belonging to the estate from his being nominated therein an executor. Among the various acts which will constitute an executor of his own wrong, the taking possession of the assets, and paying the deceased's mortgages or other debts out of them, will make one such, (*See Toller*, 17,) and he is liable to the action of the lawful administrator, who may recover against him to the amount of the assets which have been converted previous to granting administration, (*Toller*, 369.) It follows that the defendant was legally called upon to account to the administrator for the two hundred and fifty dollars belonging to the estate, which he had possessed himself of, nor could he legally set up by way of defence, the disbursements contended for. The defendant having paid into the hands of the administrator ninety-three dollars and seven cents before action brought, the verdict of the jury for one hundred and fifty-six dollars, ninety-three cents appears to have been correct, being the balance of the \$250 which the defendant had received. It is due to the defendant to state my full persuasion that his motives in taking upon himself to act in behalf of the estate were honorable, but it would be productive of infinite confusion in the settlement of the estates of deceased persons, if the acts of unauthorized agents were to be recognized as valid; more especially in the Courts of Common Pleas, who have no origi-

nal jurisdiction in the settlement of estates. The motion must fail.

Justices *Richardson, Huger, Johnson* and *Nott*, concurred.

Dunkin, for the motion.

Carr & Taylor, contra.

Administrator of *BOMAN vs. P. C. PLUNKETT*.

As a circumstance in aid of doubtful proof, comparison of hand-writing is admissible, but *per se* is inadmissible.

THIS was an action of debt on bond, and to prove its execution, in addition to proof of the hand-writing of the subscribing witness, who was dead, witnesses were called as to the hand-writing of the defendant, and the result of this examination was, that it was left doubtful whether it was his hand or not. The plaintiff then offered in evidence two other papers, acknowledged to have been signed by the defendant, with a view to assist the jury in forming an opinion of the fact by comparing them with the bond. They were objected to by the defendant, but admitted by the court, and the plaintiff had a verdict.

The defendant moved for a new trial :

1st. Because the court erred in admitting the papers above mentioned to be given in evidence.

2nd. Because, independent of these papers, the weight of evidence was decidedly in favor of the defendant.

Mr. Justice *Johnson* delivered the opinion of the court:

Proof of hand-writing must, from its nature, be of that character called probable or presumptive. It does not admit of a positive affirmative or negative ; all that can be attained are circumstances going to establish the one or the

other. It may on the one hand rise to the highest degree, of moral certainty, and on the other sink so low as scarcely to raise a slight presumption ; and between these extremes, I know of no rule which excludes any circumstances calculated to throw light on the subject ; and it is certainly no objection that the circumstance offered is not conclusive on the subject. It is enough if it assist in coming to a conclusion. The best and most usual evidence of hand-writing is that of persons long accustomed to see the party write. It is by this means the character of the writing is fixed in the mind, and forms the best standard by which to determine the identity ; but it will not be denied that the judgment would be powerfully assisted by the actual presence of the characters on which the standard was formed, and it follows that in the absence of better proof, some opinion may be formed by comparing that which is acknowledged to be genuine with that which is disputed ; and feeble as it may be, it is nevertheless a circumstance calculated in some measure to assist the judgment in deducing a conclusion from other parts which are doubtful. In *Algernon Sidney's* case, (1 *Phillips*, 365, 423,) evidence even more exceptionable, if its weakness is good ground of objection, was admitted. There, a witness who had only seen him write once, was permitted to speak of his hand-writing ; and surely when the judgment is formed on a single specimen, the actual comparison with the specimen would be a safer test of truth, and would be more safe as a check on the witness, who, in mere matters of opinion, is at least liable to err, and although his attainder was afterwards reversed, it was not on the ground of the inadmissibility of such evidence, but because the jury were instructed to believe that he wrote the paper attributed to him by comparing it with other papers wrote by him. So in the case of *Lord Ferrers vs. Shirley*, (1 *Phillips*, 368,) and *Layer's* case, (1 *State Trials*, 275,) witnesses who had never seen the parties write, were permitted to speak of their hand-writing ; having obtained some knowledge of it by a correspondence with them.—

But it has been urged that the evidence given in this case is excluded by the rule laid down in the case of *Macfer-son vs. Thoots*, (*Peake's N P. C.* 20.) It is impossible to reconcile the application of that rule, to the extent contended for, with the obvious principles of the preceding cases, and I think the rule itself has been misconceived. It does not appear to me to exclude the evidence altogether, but to confine its operation and influence within its legitimate bounds, and has stamped it with that feeble character which renders it wholly unsafe to act upon. I come therefore to the conclusion that as a circumstance in aid of doubtful proof, comparison of hand-writing is admissible, but, *per se*, is so feeble as to be unsafe to act upon; and that in the absence of any other proof, it would be inadmissible, because it proved nothing, and that the evidence in this case was properly admitted. This view of the first ground of the motion concludes the second, and no remarks on it are necessary.

The motion is refused.

Justices *Huger*, *Nott*, *Gantt* and *Richardson*, concurred.

Hunt, for the motion.

Prioleau, contra.

The Heirs at Law of JOSEPH WITHERSPOON *vs.* the Executors of JOSEPH WITHERSPOON.

A paper was offered as the will of A. the preamble being in the hand-writing of a friend, and the disposing clauses in the writing of the testator, but not signed, but ending with a verse he directed to be engraved on his tomb, the court *Held*, that parol evidence of his declarations were admissible to shew whether he intended it for his last will or not.

Tried at Williamsburgh, April Term, 1823.

THE defendant propounded in the Court of Ordinary a

a paper writing, as the last will and testament of *Joseph Witherspoon*. The caption which was in the usual form of a will, "In the name of God, Amen, I, *Joseph Witherspoon*, &c." was written by a gentleman in the neighbourhood, and all the disposing clauses were in the handwriting of the deceased, and concluded with a verse which he directed to be engraved on his tomb stone. It was neither dated nor signed by the deceased, nor was there any subscribing witness. There was no evidence at what time it was written, nor of the *animus testandi*, except what appeared on the face of the paper, nor when it was found, nor any reason given why it was not completed. The ordinary pronounced in favor of the paper, and admitted it to probate as the last will and testament of the said *Joseph Witherspoon*, deceased; and this was an appeal from that decision.

On the trial in the Circuit Court, the plaintiffs offered to prove that the paper was written four or five years before the death of the deceased, and that he continued in good health until a short time before that event; that at the time he wrote the disposing clauses, he declared that he did not intend that paper as his will, but only a rough draft from which he proposed to have one drawn. That he made the same declaration frequently afterwards, and declared his intention of making a different disposition of his property; and that very shortly before his death, it was presented to him, and he was requested to execute it, but he refused, declaring that he did not intend this as his will, and would not execute it. The presiding judge being of opinion that this evidence was inadmissible, rejected it, and the jury, under his direction, found a verdict in accordance with the decree of the Court of Ordinary. The plaintiff moved for a new trial, on the ground that the court ought to have permitted the evidence tendered to have gone to the jury.

Mr. Justice *Johnson* delivered the opinion of the court: The decision of the Circuit Court, by which this evi-

dence was rejected, is predicated on the rule of law which excludes parol evidence calculated to add to, vary or controul the provisions of a will, (*Phillips*, 479.) Of the correctness and the salutary effects of this rule there is no question, but I think its want of application to the case under consideration is equally clear. The error appears to me to have originated in applying to this paper the appellation of will. The law writers define a will to be a complete and legal declaration of a man's intentions as to what he would have done with his estate after his death. Does this paper comport with this definition? Is it a complete and legal declaration? To determine this question, when there is any positive rule, we must look to that as our guide; as for instance, to a will of real estate, the statute requires that the name of the testator should be signed, and that it should be attested by three witnesses. Without these, it wants that complete and legal character required by the definition to effectuate the object of the testator. In the absence of any positive rule, we must resort to the usages of mankind to determine it. Thus, when we speak of a bond or promissory note, we know that usage has rendered a seal indispensable to the character of the first, and the signature of the drawer to the latter, and without these appendages, they would want the most essential constituent of the appellation given to them; and so of a will, it was never heard of; that a man of ordinary understanding sat down to make a will, professedly with an intention not to subscribe his name to it. Such a thing rarely, if ever, happened. When we speak, therefore, of a will as containing a complete and legal declaration, we do it with reference to that circumstance. His signature is the act by which he seals his sanction to the operation it is intended to have; it precludes the idea that any thing more was intended; it is the factum of the thing itself; and in the language of the definition, it is a complete and legal declaration of his intention; and in such a case, the rule would operate in full force; but not so with respect to that to which this finishing stroke is not

given. We cannot know but from extrinsic circumstances whether the testator did or did not intend to give other legacies, or to charge those already given, and from their very nature, they can only be proved by parol. It is not intended to lay down the position that a paper which wants the signature of a testator, can, in no case, operate as a will; on the contrary, there are numberless cases in which they have been admitted to probate, but always on proof of extrinsic circumstances going to show the *animus testandi*; as in the common case of the testator's being prevented from signing by his sudden death; of its being found amongst his valuable papers, and a variety of others; but in all these cases, it will be found to need the aid of those circumstances to give it effect. There may be cases which would constitute an exception to this rule, as when it was expressed, (if such a case ever did happen) that the testator intended it should operate without his signature, or when it was apparent from the paper that he intended it should so operate; none of which appear to me, however, to apply to this case. From this view of the case, it is apparent that the rule which governed the judgment of the Circuit Court was not applicable; and in the absence of authorities, I have found some difficulty in referring the case itself to its proper principle. It appears to me, however, to fall within the rule which admits of parol evidence to explain doubts created by extrinsic circumstances, (*Phillips*, 467.) On this principle, in the case of *Beaumont vs. Fell*, (2 P. Wms. 140,) the court permitted parol evidence to shew that *Gertrude Fordly* was the person to whom a legacy was bequeathed by the name of *Catherine Earnly*. There, the circumstance that there was no such person as *Catherine Earnly* was extrinsic, and so in this case, the will being incomplete, the fact, whether he intended it to operate as such was also extrinsic, and could only be supplied by parol. I have not been able to discover that this question has ever before been made, and indeed the solution appears so palpable as to lead to the conclusion that it never has. The cases in

which such evidence has been admitted, without opposition, are almost numberless ; and so far as precedent can operate to establish a will, none is better established than that it is admissible. Indeed, almost all the contests about admitting wills to probate, have arisen on those presented in an unfinished state, where the *factum* of the will and the *animus testandi* were the principle grounds of contest, and which, in the absence of written evidence, could only be proved by parol. To mention one only, it was admitted in the case of *Scott vs. Rhodes*, (1 Phil. 12,) to show the *animus testandi* in relation to an unfinished will, although it was apparent on the face of the will itself, that the testator intended to do more, to give it effect. I think therefore that the evidence tendered was improperly rejected, and that a new trial ought to be granted.

Justices *Huger*, *Nott* and *Richardson*, concurred.

Dunkin, for the motion.

Gourdin, contra.



THE STATE vs. GULDEN.

Where the defendant has been indicted for murder and manslaughter, and the bill thrown out by the grand jury for the murder, but found on the count for manslaughter, and the solicitor enters a *nolle prosequi*, with the intention of presenting a new bill for the murder, the prisoner will not be discharged, but may be bailed at the discretion of the court.

Tried at Colleton, April Term, 1823.

A BILL of indictment was preferred against the defendant under the act of 1821, for murdering a slave. In addition to the count for murder, it contained also a count for killing in sudden heat and passion ; and the grand jury found a true bill as to the last only, and the defendant

appeared and demanded his trial ; on which, the solicitor, with the permission of the court, entered a *nolle prosequi*. A motion was then made to discharge the prisoner. In opposition to this motion, the solicitor exhibited the examination of several witnesses taken on the inquest held on the dead body, furnishing strong presumptions of the guilt of the defendant; and declared his intention of preferring a new bill against him at the next term. The court rejected the motion, but ordered the defendant to be bailed, himself in \$2000, and two securities in \$1000 each, for his appearance at the next term. A motion was made in this court to rescind that order, and for the discharge of the prisoner, on the following grounds :

1st. Because the defendant was entitled to his discharge on the rejection of the first count by the grand jury, and a *nolle prosequi* entered as to the other.

2nd. In any event, the prisoner was entitled to be bailed on his own recognizance.

Mr. Justice *Johnson* delivered the opinion of the court:

The rejection of the bill by the grand jury, furnishes a strong presumption of the innocence of the accused, and a *nolle prosequi* is usually predicated on a conviction on the part of the prosecuting officer, that the evidence is insufficient to support the prosecution ; it is therefore usual, and I might add *prima facie* the right of the accused to be discharged in either case. It would be idle and oppressive to retain him in custody, when there existed no intention of pursuing him further, and more so, when there was no foundation for the prosecution. Such, however, is not the legal consequence of the rejection of the bill by the grand jury, or the entry of a *nolle prosequi* ; neither put an end to the prosecution ; he may be indicted again for the same offence ; and *Chitty* in his *Treatise On Criminal Law*, (vol. 1, 325,) illustrates the rule with a case from *Foster*, very analogous to the present. There, a true bill was found against the accused for murder, and upon the developement of the facts, it amounted to petit

treason, and the court held that the crown might procure the indictment to be quashed, and prefer another for petit treason. The effect of a *nolle prosequi* is much the same. It does not operate as an acquittal ; for the accused may be afterwards indicted for the same offence, (1 *Chitty*, 480.) Formerly the judges exercised a discretion in discharging a prisoner acquitted on a trial before the petit jury of an atrocious crime, when, in his opinion, the verdict was against evidence ; and might compel him to find security for his good behaviour ; and although this practice is now exploded, even at this day when on a trial before the petit jury, the prisoner has been acquitted on account of such a defect in an indictment as will render it no bar to a subsequent prosecution for the same offence, the court may, in its discretion, detain him in custody in order to be indicted in such a way as to answer the ends of justice, (1 *Chitty On Crim. Law*, 649.) It results that this prosecution was not at an end, and the accused might be again indicted ; and without the power of retaining him to answer, the right to prosecute would be useless.

2nd. In cases not bailable as a matter of course, the power is to be exercised in the discretion of the court.—None can claim it *de jure*, (1 *Chitty On Criminal Law*, 98.) and if the power to bail be discretionary, it follows that the character and quantum of the bail is so also. The court might, in the exercise of this discretion, have refused to admit the accused to bail ; it might have bailed him on his own recognizance ; but this court is satisfied that the power was, in this case, discreetly exercised in requiring the accused to find security for his appearance to answer this charge. The motion is therefore refused.

Justices *Huger*, *Nott*, *Gantt* and *Richardson*, concurred.

Hunt, for the motion.

Petigru, Att'y Gen. contra.

THE STATE vs. JOHN THOMAS.

An indictment, under the act of 1737, for stealing bank bills, &c. must state a sum certain due on the notes and unsatisfied at the time the theft was committed.

Tried at Charleston, January Term, 1823.

THE prisoner was indicted for a larceny in stealing a pocket-book and sundry bank bills. The indictment contained three counts : the first, charged that the prisoner, " with force and arms at Charleston, in the district of Charleston aforesaid, one pocket book of the value of one dollar, of the proper goods and chattels of *John Bruce*, and one promissory note, called a bank note, for the payment of five dollars, and of the value of five dollars ; one promissory note, called a bank note, for the payment of ten dollars, and of the value of ten dollars ; one promissory note, called a bank note, for the payment of twenty dollars, and of the value of twenty dollars ; and one promissory note, called a bank note, for the payment of fifty dollars, and of the value of fifty dollars, the property of the said *John Bruce*, feloniously did steal, take and carry away against the form of the act of assembly, &c."

The second count was for stealing the notes alone, describing them as bank bills, and differing from the first in no other respect.

And the third count was at common law, for stealing the pocket-book alone.

The proof of the prisoner's guilt, both as to the bank notes and the pocket-book, was abundant, but no evidence was offered as to the value of the pocket-book.

The jury, under the direction of the court, found a verdict of guilty, generally.

A motion was made to arrest the judgment as to the two first counts, on the grounds stated in the opinion of the court below, and for a new trial as to the third, on the

ground that there was no evidence of the value of the pocket-book.

Mr. Justice *Johnson* delivered the opinion of the court :

The two first counts in this indictment, so far as they relate to stealing the bank bills, are founded on the act of 1737, (*Pub. Laws*, 147, 2 *Brevard*, 196,) which provides, “that if any person or persons, after the 25th day of March, 1737, shall steal or take by robbery, any bond, warrant, bill or promissory note for the payment or securing the payment of money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars. are termed choses in action, it shall be deemed and construed to be felony of the same nature and same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen or taken by robbery any other goods of like value, with the money due on such bill, bond, warrant or note, or secured thereby, and remaining unsatisfied, and such offender shall suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value with the monies due on such bond, warrant, bill or note respectively secured thereby, and remaining unsatisfied, &c.”

The ground of the motion in arrest of judgment, assumes the position that an indictment framed on this act must state a sum certain due on the notes and unsatisfied at the time the theft was committed, and as this contains no such allegation, it is defective, and upon it no judgment can be rendered.

In framing an indictment on a statute, all the circumstances which constitute the definition of the offence in the statute itself, so as to bring the accused precisely within it, must be stated ; and so inflexible is the adherence to this rule, that not even the fullest description of the offence, were it even in the terms of a legal definition, would be sufficient without keeping close to the expression of the statute, (*1 Chitty On Crim. Law*, 281. 2 *Foster*, 424.)

The necessity of a strict conformity to this rule must be apparent to every one conversant with legal proceedings ; and so rigidly is it adhered to in the English courts, that on the one hand, no other description of the thing in which the offence was committed is necessary to be stated in an indictment founded on a statute, but that contained in the statute itself, unless the value become necessary to fix the grade of the offence, (*2 Leach*, 1103.) And on the other hand, the most ample description will not supply the omission of the terms used in the statute, (*2 East*, *P. C.* 601. In the application of it to the present case, it will only be necessary therefore to examine the charge and inquire whether it contains all that the act, on which it is founded, renders necessary to the consummation of the offence. To take a single instance, (and the charges are all the same with respect to the bank bills,) the prisoner is charged with stealing “one promissory note, called a bank note, for the payment of one dollar, and of the value of one dollar.” This description, so far as it goes, may be well ; but when the court is called on to pronounce the sentence imposed by the act, it will be found that the prisoner is to suffer the same punishment that he would have done, if he had stolen “other goods of like value with the money due on such note, and remaining unsatisfied,” and we look in vain through this indictment to ascertain that fact ; consequently no judgment can be pronounced. It was argued, however, in opposition to this motion, that this deficiency is supplied by the averment that the note was “of the value of one dollar,” and that the finding of the jury is conclusive as to that fact.—The rule as laid down, would I think, be a sufficient answer to this argument, but it equally follows from an attentive analysis of the indictment. Stealing choses in action was not an indictable offence at common law, and the reason given is that their whole value was that of the price of the paper and wax, which was too insignificant to be worthy of punishment, and they are only rendered valuable on account of the sum due or secured to be paid by them ; if therefore the sum due on them had been paid

and satisfied, there was an end to that value. Now, whether the averment of the value in this indictment has relation to the paper only, or whether to the sum due upon it, cannot be ascertained from the indictment, and in pronouncing judgment, the same uncertainty exists. The sum of it is, that where nothing is due, there is nothing of value to steal, and it is therefore a subject on which a felony cannot be committed, (2 *Leach*, 1036. 4 *Blackstone's Comm.* 234.)

The act of the Legislature on which this indictment is framed, and the statute of 2 *Geo. 2*, chap. 25, s. 3, with respect to this question, use precisely the same terms, and it will be found by reference to the indictment framed on that statute, that they all contain the averment that the sum mentioned in the note, &c. was due and unsatisfied at the time the felony was committed. (*Vide for the Statute*, 3 *Chitty On Crim. Law*, 928. *Precedents*, *ibid*, 968, 91,) and in the absence of any positive rule on the subject, it is safest to adhere to them. Precedents so long established and so universally used, are at least safe, and although we may not at once see the imperious necessity of all they contain, at another time, and on another occasion, their usefulness may be developed. With respect to the third count, and so much of the first as relates to the pocket book, there is no doubt that they are good, and that the court would be justifiable in pronouncing sentence on the prisoner; but there are circumstances which enter into this case, which call on the court to exercise a humane, and at the same time, sound discretion in sending it back. In the first place, there was no evidence of the value of the pocket-book, and in the next, the bank bills which were stolen at the same time, were evidently the basis of the prosecution; and above all, this is a second conviction for grand larceny, and the court would be called on to pronounce the sentence of death on the prisoner, and the great probability is, that if the prosecution had rested on the theft of the pocket-book alone, which at most could have been but of little value, the jury might have been induced to find the prisoner guilty of petit lar-

ceny. The motion to arrest the judgment, so far as relates to the charges for stealing the bank notes, and for a new trial, so far as relates to stealing the pocket-book, is therefore granted.

Justices *Nott*, *Gantt* and *Richardson*, concurred.

Rice, for the motion.

Petigru, Att'y Gen. contra.

[This case was not delivered to us until after the Columbia Term was printed.]

HUGH YOUNG vs. JOHN STOCKDALE.

Where a deed was 26 years old, and offered in evidence, it was held sufficient to prove the hand-writing of the grantor and one of the subscribing witnesses; all the parties being dead, and the other subscribing witness, a young man, when he signed, and his writing unformed, Fairfield district, tried before Mr. Justice *Colcock*, November Term, 1822.

Trespass to try Titles.

THE plaintiff claimed under a grant to *George Evans* in December, 1771, for 3000 acres, and offered evidence to show that *Evans* had conveyed to *John Rutledge*. He then produced a deed from *Charles Rutledge* to the plaintiff, dated 1st June, 1799, for 700 acres, and proved that he was one of the heirs of *John Rutledge*.

The defendant offered in evidence a deed from *John Rutledge* to *Edward Rutledge*, dated 6th May, 1794, mortgaging the lands he bought from *Evans*, the grantee, and giving the said *Edward*, his heirs, &c. a power to sell and convey. This deed was witnessed by *Keating L. Simons* and *John Dunlap*.

Judge *Colcock* who presided, proved the hand writing of *John Rutledge*, the grantor, and of *Keating L. Simons*, one of the subscribing witnesses, and that both the subscribing witnesses were dead. He could not prove the hand writing of *Dunlap*, but stated that *Dunlap* must have been a very young man when he witnessed the deed, under age as he believed, and his hand unformed; that he studied law in Mr. *Edward Rutledge's* office, and that

his hand writing improved very much afterwards. He had no doubt that *Dunlap* had witnessed the deed, but he could not prove the hand writing. His honor rejected the deed, because *Dunlap's* hand writing was not proved.

Mr. *John Rutledge* left eight children, and the jury found for the plaintiff one eighth of the land sued for without locating it ; but no damages.

The defendant appealed and moved for a new trial.

1st. Because the deed from *John Rutledge* to *Edward Rutledge* was sufficiently proved, and ought to have been received in evidence.

2d. Because the verdict is void for uncertainty.

Mr. Justice *Richardson* delivered the opinion of the court :

The deed offered in evidence was old ; and the grantor *Rutledge*, and the witnesses all dead.

Under these circumstances, the hand writing of *Rutledge* and of one witness was well proved ; and that of the other witness proved to have changed after he grew up to manhood ; and though the witness would not swear to it, he could not but believe it to be *Dunlap's* hand writing.

The law does not require in any case all the testimony which can be adduced, but that whatever is adduced shall be the best the nature of the case affords, (*See 1 East, 450. 2 Bay, 142. 6 Binney, 45. 1 Camp. 45, &c.*) as where there are several witnesses to a deed, it is enough that one be sworn to the execution of it.

In the case before us, not only was *Dunlap* dead, and his hand writing greatly changed, but the deed 26 years old, which rendered it very difficult of more certain proof. Four years more, and it would have been proved from its age alone. It was then evidently a case admitting of secondary evidence, and better proof of the hand writing of the parties than that which was adduced, could scarcely be expected at this day.

The motion is therefore granted.

Justices *Huger, Nott, Gantt* and *Johnson*, concurred. *Clark*, for the motion.

Peareson & De Saussure, contra.

INDEX.

AGENT.

See *Venue Master*, 1.
Warranty.

1. Where the agent of the captors libelled the prize in their own names, for the captors, and the prize goods were sold by the order of the Court of Admiralty, the court held the agents might bring an action in their own names for the purchase money, 146
2. Also held, that the Marshal, who made the sales was a competent witness to prove the same.—*Depau vs. Hyams*, 146

AMENDMENT.

See *Practice*, 5.

APPRENTICE.

See *Master and Apprentice*.

ARBITRATORS.

See *Awards*.

ARREST OF JUDGMENT.

See *Indictment*.

ASSIGNMENT.

See *Insolvent Debtor*. *Chose in Action*.

ATTORNEY.

1. On a rule against an attorney for not paying over money to his client, it will be discharged, if it appear that *ex æquo et bono*, he is not entitled to it.—*Hyneman vs. Washington*, 493

ATTACHMENT.

1. The City Court of Charleston has no jurisdiction of cases in attachment.—*Tobman vs. Thompson*, 43
2. Where a garnishee omits in his return to state what goods, &c. may be in his "power," as well as possession, &c. the attaching creditor should make his exceptions to such return by suggestions, and not file a declaration against the garnishee as if *no return* had been made.—*Tavel vs. Barre*, 201
3. A domestic attachment, it

68

seems, cannot be levied on land.—*Boyce vs. Owens*, 206

4. Judgment by default may be taken against a garnishee in attachment, as in other cases.—*Gracy & Co. vs. Coates*, 224

5. But the garnishee is not liable for the costs recovered against the absent debtor, except where it appears that he has funds in his hands sufficient for that purpose. In those cases they are given by the act, and in no other, 16

6. Partnership property may be attached for the individual debt of one of several co-partners. *Schutzi & Co. vs. Bolton*, 478

7. Partnership property may be attached for the individual debt of one of the partners, after the partnership has been dissolved, and a receiver appointed by court to get in and dispose of the assets. 16

8. S. W. C. & A. under the firm of S. & Co. were in company, and did business in Lexington, Kentucky, and C. and A. two of the partners, did business in New-York, under the firm of A. C. & Co. On the 1st of November the Kentucky house dissolved, and afterwards the New-York house being complainants, and the Kentucky house defendants to a suit in the U. S. Circuit Court, at Lexington, the court appointed S. of the Kentucky house to get in and pay away the partnerships assets, and commissioners were appointed to state the accounts between the partners. On the 6th August, 1818, *Bolton & Co.* attached in Charleston funds of the Kentucky house, for a debt due by the New-York house. The Kentucky house contended that in consequence of the decree in Kentucky, the funds of that house were not subject to such attachment until a settlement under that decree; but the court refused to discharge the attachment, 16

I N D E X .

AWARDS.

1. Upon an agreement to refer matters in dispute to two arbitrators, "with power in case of disagreement to choose an umpire," the arbitrators may select the umpire before they act upon the reference.—*Peck vs. Wakely*, 279
2. An award that the plaintiff should give the defendant *sufficient indemnity* as to certain contracts, and should *indemnify* him against certain other supposed claims, is not void for uncertainty; but the words were held to mean, from the whole context of the award, the mere personal responsibility of the plaintiff, and not a bond, &c. 16

BAIL.

1. Bail is not discharged in consequence of the plaintiff taking out a *fi. fa.* previous to the issuing of a *ca. sa.*—*Ogier vs. Higgins*, 8
2. No special order for bail need be endorsed upon a writ, where the plaintiff swears to a particular sum due upon the recission of a contract.—*Mickle vs. Baker*, 250
3. No person, (unless a transient person,) can be held to bail for a less sum than \$30 61
Cheshire vs. Edson, 385

BASTARD.

1. The presumption should be always in favor of the legitimacy of a child, and he should not be bastardized by mere rumor.—*Vaughan vs. Rhodes*, 227
2. On an indictment for bastardy, it is unnecessary to allege that the child is likely to become a burthen upon the district, and that the defendant refused to enter into recognizance for its support, in pursuance of the act; and if such averment be made, it need not be proved. If the defendant did give such bond, he should plead it in bar.—*State vs. Mc. Donald*, 299

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Executor.

1. In an action by an indorsee against an indorser, notice of non-payment was proved to have been given the indorser, but the court *held*, that it was necessary to make the indorser liable to prove an actual demand upon the drawer, previous to the notice of non-payment to the indorser.—*Aubin vs. Lazerus*, 134
2. Where a note, made *bona fide* for valuable consideration, is brought into market, it may, like any other property, be sold for less than its nominal value.—*Fleming vs. Mulligan*, 178
3. A note payable on demand, is not entitled to days of grace; but an action may be immediately brought without any other demand being made.—*Harrison vs. Cammer*, 246
4. A. and B. gave a joint and several note to C. afterwards, by agreement with A. & C.—D. signed his name to the same note, and C. then brought an action against A. B. and D. upon their *joint and several* note, the court *held*, that the plaintiff should fail, as his *allegata* and *probata* did not correspond. The note not being a *joint* contract by D. and A. & C.—*Ives vs. Pickett*, 271
5. The endorser of a note is discharged, if notice of non-payment by the drawer is not given, or if a demand be not made on the drawer, although the note be drawn in the name of a firm which is dissolved.—*Butler vs. Denham*, 350
6. An assignment of a *chose in action* not negotiable, has always been considered by our court as a letter of attorney to the assignee; the assignee or holder of one that is negotiable may therefore elect to regard himself in that character, or sue in his own name.—*Ware vs. Key*, 373

I N D E X .

7. An indorser of a sealed note is not liable as an indorser, and where he suffered judgment to go against him, he was not allowed to recover the costs so incurred from the drawer.—*Parks vs. Dukes*, 380
8. An indorser to a note made payable to *bearer* is liable as upon a new bill to the bearer.—*Eccles vs. Ballard*, 388
9. Whether there was any artifice used to get the indorsement, or if it was made under circumstances that would exempt the indorser from liability, is for the jury; and the question of diligence in making a demand on the drawer and notice, in the same manner depend on circumstances, and must be left to the jury. *Id*
10. Notice of non-payment must be given to one who indorses a note after it becomes due, as to an indorser of a note before it becomes due.—*Stockman vs. Riley*, 398
11. If the 3d day of grace happen on a Sunday, the demand may be made on the second.—*Furnan vs. Harman*, 436
12. The acceptor of a bill of exchange, and the maker of a promissory note are not liable to an indorser for the costs which he may have incurred in consequence of default of payment by them.—*Sawyer & Steel vs. Steel*, 459

CAVEATS.

See Trespass to try Titles.

CHOSE IN ACTION.

1. An assignment of a *chose in action* not negotiable, has always been considered by our court as a letter of attorney to the assignee; the assignee or holder of one that is negotiable, may therefore elect to regard himself in that character, or sue in his own name.—*Ware vs. Key*, 373

CHALLENGE.

See Duel.

CITATION.

1. A citation from the ordinary, giving notice of one's intention to apply for administration, need not be published in a newspaper; but it is enough if read by an officiating clergyman in church.—*Sargent vs. Fox*, 309

CITY ORDINANCE.

1. The evidence to convict a person under the 13th clause of an ordinance of the city of Charleston of 1815, prohibiting retailers of liquors from selling to persons of color, or admitting them into their premises after certain hours, is sufficient if it be proved that such persons were seen in such shop after such hour, drinking spirits and water; though no money was seen paid.—*Council vs. Van Roven*, 465
2. The court held that a feme covert, sole dealer, was liable to the penalty under such ordinance, though the liquor was handed to the negro by her husband, she being present, and he acting as her clerk, *Id*
3. The words "admit into his or her premises any negro or person of color, or in any manner sell or retail to the same," do not mean "admit into his, &c." and "in any manner, &c." *Id*

COPARTNERS.

1. One copartner cannot authorize an appearance for the other.—*Haslet vs. Street*, 310
2. A business in which two are engaged, but having no mutual interest in the capital invested, and no stipulation for mutual loss, is not a copartnership.—*Lowry vs. Brooks*, 421

CLERK OF COURT.

1. A clerk of the court is exempt from working on the roads.—*Harrington vs. Com.* 400

CONVEYANCES.

1. No excuse can be made for

I N D E X .

as, as for a breach of warranty, may be recovered before a magistrate, if the amount be within his jurisdiction.—*Cohen vs. Saddler*, 239

2. In an action of trespass *vi et armis*, for breaking and entering the plaintiff's close and removing his fence, the necessary and unavoidable consequence of which was the loss of his crop, the court held the plaintiff might prove the loss of his crop to enhance damages.—*Harden vs. Kennedy*, 277

3. Upon a failure of a warranty of title to personal property, the rule of damages is the price paid for the property, with interest from the time of the purchase.—*Ware vs. Weatherall*, 413

4. The same rule of damages, it seems, applies as well to real as personal property, *Id*

DISCOUNT.

1. Where a party sued in the City Court of Charleston, applied for a *certiorari* to remove the case to the Circuit Court, on the ground that he had a discount to set up, the amount of which exceeded the City Court jurisdiction, the court refused it on the ground that the defendant might have his cross action; and besides, he was sued in his own right, and his discount was as executor. *Ex Parte Doyley*, 185

2. The court has, at common law, the power to order mutual judgments to be set off against each other; but a person should avail himself of the earliest opportunity to make such application, and not to delay before the interest of third persons have become involved.—*Williams vs. Evans*, 203

3. Where the plaintiff, under particular circumstances, took the defendant with a *ca. sa.* the court refused his motion to set off their mutual judgments, *Id*

4. On a motion being made to

set off mutual judgments at the same court, during which they were obtained, the court granted the motion, notwithstanding the opposite party had assigned his judgment to a third person; the assignment being so promptly made, excited suspicion that it had been done to prevent a set off.

Duncan vs. Bloomstock, 318

5. It was also held, that a judgment recovered in an Inferior court might be set-off against one of a superior court, *Id*

6. A verdict or judgment is not negotiable; the court will nevertheless respect an assignment of such where it appears calculated to promote the ends of justice; but not where it has a contrary tendency, *Id*

7. The assignee of an open account cannot offer the account in discount of his own, sued upon by the plaintiff.—*Brown vs. Thompson*, 476

DISTRESS.

See Replevin.

1. A horse sent to a livery stable to be fed and taken care of, is not liable to be distrained for rent.—*Youngblood vs. Lowry*, 39

DOWER.

1. A wife is not entitled to dower of land bought by the husband, and by him mortgaged previous to marriage to the vendor for the purchase money.—*Crafts vs. Crafts*, 54

DUEL.

1. The principal who sends a challenge or fights a duel is embraced in the act of 1812. *State vs. Dupont*, 334

2. The declarations of the second are admissible against the principal. *Id*

3. The provisions of the act that prohibits an offender from holding any office of honor, profit or trust, or of exercising any trade, profession or calling, does not constitute a *par*.

INDEX.

of the sentence to be passed on one convicted; and whether constitutional or not, can only be determined upon a person so convicted attempting to hold any such office, &c. *Ib*

EJECTMENT.

See Trespass to try Titles.

EVIDENCE.

See Bastard. Duel. Insurance. Witness.

1. To induce a belief that a receipt was endorsed upon a note to reduce the balance within the summary process jurisdiction, it must be so proved, and will not be presumed.—*Gerard vs. Fiske*, 11
2. The protest of a notary who is dead, (the hand-writing being proved,) is not admissible to prove a demand on the maker of a note, and notice to the indorser.—*Williamson vs. Patterson*, 132
3. But admissible by a subsequent act of assembly, *Ib*
4. As to what acts of a public officer are judicial or extra-judicial, and admissible in evidence.—*Williamson vs. Patterson*, *b*
5. Where the subscribing witness to a bond is dead or out of the state, the next best evidence to prove the execution of the bond, is the proof of the hand-writing of the obligor with the additional evidence of the hand-writing of such subscribing witness.—*Plunket vs. Bowman*, 138
6. In an action by a book-keeper of a bank, for money had and received, on account of a "short charge" on a check (undercharged,) the book-keeper's book kept by him, unaccompanied by his oath, (the check not being produced,) cannot be admitted in evidence upon proof of his hand-writing.—*Langton vs. Everingham*, 159
7. Any thing may be given in evidence in reply, which is a

direct answer to that produced on the part of the defendant.

Scott vs. Woodward, 161

8. So in trespass to try titles, where the defendant has shewn an elder grant, the plaintiff may do away the effect of it, in reply, by proving an adverse possession, *Ib*
9. Under a declaration for money had and received, paid, laid out and expended, the plaintiff cannot give in evidence fraud and misrepresentation in the sale of a chattel.—*Read vs. Duncan*, 167
10. Where there has been an express warranty, the action must be upon such warranty, and not upon any implied warranty, *Ib*
11. Wherever fraud or deceit forms the ground of the right to recover, a *scienter* must be alleged and proved, *Ib*
12. A bill of sale, it seems, forms no exception to the general rule that parol testimony is inadmissible to contradict or explain a deed, *Ib*
13. Proof of a promise made to an executor will not support an allegation of a promise to a testator.—*Glenn vs. McCullough*, 212
14. Where the bearer of a note brings an action against the maker who sets up a breach of warranty, on account of unsoundness in the property bought, the declarations of the payee are inadmissible.—*Lightner vs. Martin*, 214
15. The person who sold a negro to the payee a few months previous to the same being sold to the maker, is a competent witness in an action by the bearer against the maker, to prove the soundness at the time he sold her, *Ib*
16. Except where an action is on an instrument which carries on its face the evidence of consideration, it must be averred in the declaration, and proved.—*Douglas vs. Davie*, 218
17. The mere acknowledgment

INDEX.

- of a debt, without mentioning any particular amount, will not authorize a jury to give a verdict for a specific sum, *Ib*
18. But where the defendant in a note to the plaintiff, "calculated that four bales of cotton would pay the amount" due, accompanied with an order on his agent to deliver to the plaintiff "the cotton he the (defendant) had won at the Camden main;" The court *held* that the jury might, upon such evidence give a verdict for the amount of four bales of cotton, or that parol evidence might have been given to show how much cotton the defendant had won at Camden, and a verdict for that amount would have been good. *Ib*
19. Where a witness, not to criminate himself, is excused from answering a question or from being examined generally, his declarations as to the same facts, affecting the character of a third person, can not be given in evidence:
- 1st. Because such partial and *ex parte* evidence should not be allowed to the injury of any character; and
- 2ndly. Because a witness can not be cross examined to any fact, which, if admitted, would be collateral and wholly irrelevant to the matter in issue, for the purpose of contradicting and discrediting him by other evidence, in case he should deny the fact.—*Nettes vs. Harrison*, 230
20. No witness residing in the state can be examined *de bene esse*, by the common law, and we have no statute authorizing such an examination of a witness residing within 40 miles, merely because he is a president of a bank.—*English vs. English*, 238
21. If a defendant before a magistrate will not offer to deny the debt on oath, the oath of the plaintiff is sufficient to prove the demand.—*Cohen vs. Saddler*, 259
22. The declarations of the payee, indorsing a note, made after the note was drawn, but prior to his indorsement, that the note had been given for an illegal consideration (gaming) are competent testimony to invalidate the note in the hands of an indorsee.—*Snelgrove vs. Martin*, 241
23. P. gave G. an order to permit R. to have goods on credit, and he P. would be accountable. R. got goods of G. and gave him his note for them; upon an action by G. against P. for the price of these goods, the court *held* that G. was bound to prove that the note given him by R. had never been negotiated or paid.—*Goodman vs. Parish*, 259
24. When a writing is offered in evidence, so antiquated as to render it difficult if not impossible to produce a witness who had ever seen the person write, whose signature is in question, a comparison of hand writing is allowable: So the signature of a receipt by the surveyor-general, given forty years back, may be proved by a comparison with his signature to the plats and grants from his office.—*Cantey vs. Platt*, 260
25. A. & B. gave a joint and several note to C. afterwards, by agreement with A. & C.—D. signed his name to the same note, and C. then brought an action against A. B. and D. upon their *joint and several* note, the court *held*, that the plaintiff should fail, as his *allegata* and *probata* did not correspond. The note not being a *joint* contract by D. and A. C.—*Ives vs. Pickett*, 271
26. A merchant may prove his book entries in any case where it becomes necessary to have them proved.—*Black vs. Shooller*, 293
27. On an action of assumpsit to recover the value of articles

I N D E X.

- Withheld, and to recover back money paid for such as were defective, in a purchase made by the plaintiff of the defendant, of a ship and many articles contained in her, it was held, that the plaintiff ought to have produced the bill of sale as furnishing the highest evidence of the property conveyed by it, and of the covenants contained in it.—*Allen vs. Potter*, 323
28. It seems to be the understanding that although a person may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and to show that there is no express covenant contrary to the implied warranty, on which his action is brought, 16
29. The books of a school-master regularly kept are not admissible to prove his account. *Pelzer vs. Cranston*, 328
30. A book account may be proved by proving the hand-writing of the clerk who made the entries, if he be out of the state.—*Elms vs. Chevis*, 349
31. To make out a title under sheriff's sale, extrinsic evidence is admissible to shew that an execution was lodged, and that the land was sold under it, and the deed made on different days from those stated in the entry and return endorsed.—*Barmore vs. Joy*, 371
32. A declaration on a note "to pay whenever after requested," is not proved by the production of a note payable 90 days after date.—*Morris vs. Fort*, 397
33. Receipts upon a note to take it out of the statute of limitations, if apparently fair, and not attended with circumstances calculated to excite suspicion that they were endorsed for the purpose of taking the case out of the statute, are *prima facie* evidence of payment, and are to be left to the jury.—*Gibson vs. Peebles*, 418
34. A merchant, plaintiff, can not be examined by commission to prove his own account by reference to his books, and not by producing them in court; but a disinterested witness who made the entries may be so examined without the production of the books; for the entries in the book are mere memoranda, to which he may refer to refresh his memory.—*Nicholson & Co. vs. Withers*, 428
35. By refreshing his memory is not to be understood that the memoranda must bring to his recollection that every article was actually delivered. They can only inform him that he made the entries, and enable him therefore to say that he delivered the articles at the time, 16
36. The declarations of the payee of a note, made before endorsement against his interest, are admissible, but not after he has endorsed it.—*Crayton & Sloan vs. Collins*, 457
37. An endorser to a note may be a witness to prove that he endorsed it after it became due, 16
38. The evidence to convict a person under the 13th clause of an ordinance of the city of Charleston of 1815, prohibiting retailers of liquors from selling to persons of color, or admitting them into their premises after certain hours, is sufficient if it be proved that such persons were seen in such shop after such hour, drinking spirits and water; though no money was seen paid.—*Council vs. Van Roven*, 465
39. As a circumstance in aid of doubtful proof, comparison of hand-writing is admissible, but *per se* is inadmissible.—*Boman vs. Plunkett*, 518
40. Where a deed was 26 years old, and offered in evidence, it was held sufficient to prove

I N D E X .

the hand-writing of the grantor and one of the subscribing witnesses; all the parties being dead, and the other subscribing witness, a young man, when he signed, and his writing unformed.—*Young vs. Stockdale*, 531

EXECUTOR AND ADMINISTRATOR.

1. An executor may sue in his own name, or as executor, upon a note made payable to a third person or bearer, and transferred to his testator before his death.—*Floyd vs. Brooks*, 364
2. An executor in his representative capacity cannot hold lands adversely from the title of his testator.—*Thompson vs. Caldwell*, 390
3. But under certain *bona fide* circumstances, an executor's possession may be adverse from the title of his testator, *Id*
4. The executor has not the legal right of entry on the land of his testator, unless they be charged with the payment of rents, which rents may be assets in his hands, *Id*
5. An estate is not bound by the unauthorized act of the attorney of an executrix.—*Jones vs. Jenkins*, 494
6. Taking possession of assets, and paying the debts of the deceased out of them, will make a person executor *de son tort*. And upon the administrator bringing an action for such assets, such disbursements will not be allowed in discount.—*Howell vs. Smith*, 516

FALSE IMPRISONMENT.

See Trespass.

FELONY.

1. No doctrine is better established than that where one commits an offence, which is made felony by statute, and then the statute be repealed, he can not be punished as a felon in respect of that statute :

and the doctrine applies as well to the imposing and recovering of penalties, as to the creating and punishment of felonies.—*State vs. Cole*, 1

FEME COVERT.

1. The court held that a feme covert, sole dealer, was liable to the penalty under the ordinance of the city of Charleston against retailing liquors to slaves.—*Council vs. Van Rooven*, 465

FERRYMAN.

See Militia.

FRAUDS, AND STATUTE OF.

1. A promise by A. to B. that if B. would discontinue an attachment against C. that he A. would pay B. the debt, is void under the statute of frauds, not being in writing.—*Boyce vs. Owens*, 208
2. A *bona fide* gift, though voluntary, is not fraudulent against a subsequent creditor. *Smith vs. Littlejohn*, 362
3. Upon a contract with an agent to act as overseer for \$500, the employer wrote these words, "I also further say that should the above named T. in my opinion, merit or deserve more than \$500, I will give him more." The court held it was voluntary, and set aside a verdict allowing more than \$500.—*Thompson vs. Nesbit*, 471

GAMING.

1. A *still house* or distillery, is such an "out house" as is contemplated by the act of assembly of 1816, prohibiting gaming.—*State vs. Faulkner*, 438

GIFT.

See Frauds. Witness.

HOG STEALING.

See Limitations of Actions.

INDICTMENT.

1. An indictment may well contain a count at common law, and another under a statute.—

INDEX.

- State vs. Williams,* 301
2. The caption of an indictment must set forth with sufficient certainty, the court in which the jurors by whom, and also the time and place at which the indictment was found: So if it be at a special court, it should so be stated, *Ib*
3. The court have the right to amend the caption of an indictment at any time; and in this case, gave leave after conviction, to state that it was at a special court, and gave a form for such caption, *Ib*
4. An indictment for passing counterfeit money, charged that the defendant "feloniously utter and publish, dispose and pass, &c. &c." omitting the word *did* before *utter*, &c.; the court arrested the judgment on the ground of uncertainty, no charge being made that the prisoner *did* the act.—*State vs. Halder,* 377
5. Where an act has been repealed, or a new act made of force, persons guilty under the first act may be indicted, convicted and punished after it is repealed, for an offence committed before its repeal.—*State vs. Taylor,* 483
6. An indictment under the act of 1737, for stealing bank bills, &c. must state a sum certain due on the notes and unsatisfied at the time the theft was committed.—*State v. Thomas,* 527

INSOLVENT DEBTOR.

See Prison Bounds.

1. A defendant convicted of rendering a false schedule under the prison bounds act, is excluded from all benefit under that act, and the insolvent debtor's act, in any case.—*McElmoyle vs. Florence,* 29
2. Wherever an insolvent debtor has through ignorance and a mistaken idea of his rights, or inadvertence, omitted to insert in his schedule those things which his creditors have a legal right to, and

- which he can convey over, the court before whom he applies for his discharge may suffer him to amend without sending it to a jury to try the question of fraud.—*Prescott vs. Hubbell,* 64
3. So an order upon a principal, by his agent, for a sum agreed for in favor of a carrier for freight due, will carry interest from its date.—*Minott vs. Elliott,* 125
4. A person in gaol under a *ca. sa.* for assault and battery, is entitled to the benefit of the insolvent debtor's act, 182
5. It seems that "wilful and malicious trespass" within the 8th clause of the insolvent debtor's act, means "wilful mayhem," or injuries to real property, or to trespasses of an extremely heinous nature; as malicious prosecutions or conspiracies, by which life and limb may be endangered.—*Bamfield vs. Ellard,* 182
6. A defendant who has neglected to file his schedule within forty days, can not take the benefit of the insolvent debtor's act; nor does the act authorize a jury to enquire whether the omission to file a schedule was fraudulent or not.—*Strover vs. Duren,* 266
7. If a defendant has, within three months before his confinement, or at any time since, paid another creditor in preference to the plaintiff, the court may submit it to the jury, whether the defendant had preferred another creditor, but not whether the preference of one creditor to another is fraudulent or not; as the preference of one creditor *per se*, deprives the defendant of the benefit of the act, *Ib*
8. A. made an assignment under the prison bounds act to B. "and other creditors," held that the assignment was to B. alone, the words, "other creditors" being void for uncertainty.—*Black vs. Shooller,* 299

INDEX.

MILITIA.

1. All militia fines, when collected, are to be paid over into the hands of the paymaster of the regiment to which the delinquent may belong.—*State vs. Martindale*, 32
2. Cases of a military nature, are very properly of military cognizance, and ought to be submitted to and determined by the military tribunals only; and the Court of Common Pleas ought not to sustain any cognizance of them, unless where the court martials exceed their jurisdiction, 16
3. Employing a boat between Charleston and Sullivan's island, does not constitute the person a ferryman within the meaning of the exemptions at common law, or the militia act, from militia duty.—*State vs. Clarke*, 47
4. A person so running a boat has not the exclusive rights of a ferryman, nor is he liable to the same restrictions, 16
5. The arms of a militia man are exempted from execution by law, 352

MORTGAGE.

See Dower. Lien.

1. When mortgaged land is sold without a regular foreclosure, either at law or equity, a purchaser buys no other interest than an equity of redemption: And where it had been sold under an execution recovered upon the bond upon which the mortgage was given, but the money applied to satisfy an older judgment, the court granted leave upon suggestion, to have the land resold to satisfy the mortgage.—*McClure vs. Mounce*, 423

MURDER.

1. The act of 1740, to punish the murder of a slave, is not repealed by the act of 1821, taking away clergy.—*State vs. Taylor*, 483

NEW TRIAL.

See Practice. Slander.

1. Where incompetent evidence has been admitted, the court will not pretend to judge how far it did or did not influence the jury, but will grant a new trial.—*Langton vs. Everingham*, 159
2. Where a jury rejected a bond, *eleven years old*, as paid, and stated in court that they did so on account of obliterated marks upon it, which marks had not been observed by the opposite party or the court, a new trial was granted to enable the obligee to adduce evidence in explanation, and that he should not be surprised.—*Libenintz vs. Greenland*, 313
3. As a general rule, facts unknown to the court are not permissible to influence the finding of the jury, 16
4. Surprise alone, it seems, arising out of circumstances unknown to the party, and without his control, is of itself sufficient to authorize a new trial, 16

NOTICE.

See Conveyances. Bills of Exchange.

1. When a contract stipulates for the performance of a condition, on the event of a contingency, the occurrence of which must be known to one of the parties, but not necessarily known to the other, it is the duty of him to whom it is known to give such notice to the other, as a sound discretion would dictate, under all the circumstances of condition to be performed, contiguity of parties, &c.—*Birdseye vs. Davis*, 296
2. It is sufficient notice of the dissolution of a copartnership, if such circumstances be proved, as leave no rational doubt that the party knew of the dissolution.—*Irby vs. Vining*, 379

PARTNERSHIP.

See Copartners. Notice.

INDEX.

PATROL.

The patrol act of 1819, is by a re-enactment of the act 1809, and the former acts, with some small alterations.—

ite vs. Cole,

The act of 1819 and 1809, differ in three particulars:

As to the amount of fines.

On the person before whom penalty is to be recovered.

On the appropriation of the fees,

The captain of a beat company cannot constitute himself the captain of patrol.—

ite vs. Cole, et al.

1

Ib

117

PAYMENT.

A debtor has the right to apply his payments to whatever he pleases; so where A. and B. upon a note, B. conceded that he had agreed with A. that C. for whom he was working, should pass his notes as they became due, to the credit of this note; it was held a sufficient reply that the notes had been regularly discounted the work passed to the credit of a book account to C. created during the time B. worked for C. consisting of all items from day to day.—

ack vs. Shooler,

293

PLEADING.

See Practice.

The filing of consistent double pleas, so far as their merit concerned, is a mere motion in course, which only requires the signature of counsel.—

Richardson vs. Whitfield, 148

Except where an action is brought on an instrument which carries on its face the evidence of consideration, it must be averred in the declaration and proved.—*Douglass vs. Davie,* 218

The plea of *liberum tenementum*, admits the possession in the plaintiff, and the trespass charged in the plaintiff's pleading; and where the plea was not supported, and notwithstanding the jury gave a

verdict for the defendant, the court granted a new trial.—

Caruth vs. Allen,

226

4. A variance between the writ and declaration can not be taken advantage of in arrest of judgment; it must be by plea in abatement or demurrer.—

Parr vs. Bogan,

386

5. The words *vi et armis* do not necessarily make a writ in trespass; a writ may still be case and contain these words as surplusage,

Ib

6. The rule requiring copies of all notes and contracts sued on, to be attached to the declaration, does not excuse any irregularity of pleading.—*Morris*

vs. Fort,

397

7. The statement of a *frivolous*, with a *sufficient* consideration for a contract, will not vitiate the declaration, but the insufficient consideration may be stricken out—*Lowry v. Brooks,* 421

8. It is sufficient that a declaration upon a special contract contains every material part of the contract, and almost every word,

Ib 421

9. An action for *money had and received* on account of the failure of an article purchased, can not be maintained until the property has been returned or tendered back; but to support an action on the warranty, it is not necessary that the property should either be tendered or returned. And this rule relates as well to *implied* as to *express* warranties.

Ashley vs. Reeves,

432

10. And in declaring on an *implied* warranty, the declaration is the same as upon an *express* warranty,

Ib

11. It is not every *special* assumption that is an *express* assumption; for a *special* promise may as well arise by implication of law as by the *express* promise of the party,

Ib

POSSESSION.

See Trespass to try Titles.

INDEX.

PRACTICE.

See *Special Courts. Venue. Indictment. Sheriff.*

1. When the law has been solemnly settled by the court, if it were possible that a thousand verdicts could be given against the decision, they would still be wrong, and the court must either adhere to its opinion or suffer the juries of the country to become the expositors of the law—*McGrath & Jones vs. Isaacs*, 26
2. As a general rule, this court will not hear a question which has not been made in the court below, but many exceptions to it have been allowed; and where the jury found three verdicts against the opinion of this court, a nonsuit was granted, though not moved for below, *Ib*
3. Where a verdict in debt was for damages beyond the amount of damages laid in the writ, the court ordered a *venire de novo*, unless a *remittitur* was entered for the surplus.—*Givens vs. Porteous*, 48
4. But after such order of the Appeal Court, and before final judgment is entered, a judge may, at Chambers, grant leave to the plaintiff to amend his record by increasing his damages from \$10 to \$1000, *Ib*
5. Formerly it seems, when the record was once made up, no amendment could be permitted; but now the courts have become more liberal, and when justice requires it, will allow of amendments at any time while the suit is depending, till judgment be given, *Ib*
6. Where the facts relied on to prove a deviation in a voyage from the policy were unsatisfactory, the court granted a new trial for a more complete investigation.—*De Areos vs. So. Ca. Ins. Company*, 113
7. Where an act imposes a penalty, and points out the manner by which that penalty shall be recovered, that method, and that only, must be pursued.—*State vs. Cole*, 117
8. To authorize the court to pronounce judgment on a special verdict, the legal affirmative or negative conclusion must follow as a necessary consequence from the facts stated. *State vs. Duncan*, 129
9. This court can not amend a special verdict by expanding what may be thought surplusage or supplying a notorious fact, in order to support a judgment of guilty, *Ib*
10. The court may amend in some cases, but it has never gone so far as to supply facts incompatible with those found; it would be an infringement of the trial by jury, *Ib*
11. A return to an execution by a deputy sheriff, is a sufficient and legal return.—*Ford vs. Villers*, 144
12. To a *scire facias* upon a judgment, it cannot be objected that the judgment was founded on a blank declaration which had never been filled up until after the judgment had been entered; it is sufficient that at the hearing of the *scire facias*, the record when produced was perfect. If it be proposed to set it aside, another proceeding must be adopted, *Ib*
13. There may be cases of extreme hardship or gross fraud, which would justify the Circuit court in rescinding the orders of a preceding term, yet when one judge has granted leave to plead the statute of limitations, another judge will not interfere.—*Richardson vs. Whitfield*, 149
14. Where a defendant states by affidavit that he has a substantial defence, and plainly shows that there had been a mistake between himself and his attorney, the court will suffer such defendant to enter pleas and make his defence, notwithstanding no appearance had been entered the first term, after the service of the

INDEX.

- writ. Such indulgence will be allowed whenever by misfortune or neglect his appearance has not been entered at the usual time.—*Watkinson vs. Cummings*, 250
15. After a prisoner has plead not guilty, and the jury charged, it is too late to move to plead a misnomer.—*State vs. Montague*, 257
16. Where there are too or more distinct counts in an indictment, charging different and distinct offences, and punishable differently, a general verdict of guilty is bad.—*State vs. Montague*, 257
17. Where the plaintiff issued a summary process against two who had signed a joint and several note, and *non inventus* returned as to one, the court held he might take judgment against the other.—*Caldwell vs. Harp*, 275
18. Where a summary process is taken out upon a note within that jurisdiction, but which, pending the action, increases by interest to an amount beyond that jurisdiction, the plaintiff may either take judgment to the extent of the jurisdiction, or he may declare and transfer the case to the general jurisdiction.—*Gray & Co. vs. Wright*, 278
19. One copartner can not authorize an appearance for the other.—*Haslet vs. Street*, 310
20. An objection to the regularity of a reurvey, (in an action to try titles,) according to the rules of court, must be made before the cause has gone to the jury.—*Barmore vs. Joy*, 371
21. Irregularities in legal proceedings cannot be taken advantage of by third persons.—*Thompson vs. Caldwell*, 390
22. The court may, before going into trial, grant leave to the defendant to withdraw a plea of justification, when it can do no injury to the plaintiff.—*Bell vs. Hutchinson*, 409
23. A judge may, at his discretion, request a jury to reconsider their verdict. *Id*
24. It is not a sufficient ground for postponement, that the plaintiff discontinued as to one of the defendants. It is not such an amendment as will entitle the defendant to a continuance.—*Righton vs. Sinter*, 412
25. It is not sufficient cause to set aside a judgment by default after a term has elapsed, and after the second day of the second court, that the inquiry docket had not been called during the term elapsed; for if the defendant wished to set aside the judgment at the first court, he should have performed the necessary conditions.—*Day et al. vs. Eastburn*, 459
26. The court may, at discretion, under particular circumstances, permit the defendant's attorney to enter an appearance and move to set aside a judgment by default after the second day of the next term.—*Sargent vs. Wilson*, 512
27. Where the defendant has been indicted for murder and manslaughter, and the bill thrown out by the grand jury for the murder, but found on the count for manslaughter, and the solicitor enters a *nolle prosequi*, with the intention of presenting a new bill for the murder, the prisoner will not be discharged, but may be bailed at the discretion of the court.—*State vs. Gullen*, 524

PRESCRIPTION.

1. A right of way over another's land may arise in three ways: 1st. From necessity: 2d. By grant: 3d. By prescription.—*Lawton vs. Rivers*, 445
2. To establish such necessity, nothing is required but to show the necessity. If the necessity has existed but for a day, the claim is as well founded as when it has existed for half a century. But there must be an actual necessity,

INDEX.

and not a mere inconvenience to entitle a person to such right,

3. Where a person living on an island had a navigable water course from his own door to the high way, of no greater distance than to pass through his neighbor's field, the court *held*, it was not such necessity as gave him a right of way over the field,

4. Three things are necessary to establish a right by prescription:—1st. Continued and uninterrupted use and occupation or enjoyment: 2d. The identity of the thing enjoyed: and 3d. That it should be adverse from the right of some other person,

5. Every immaterial change in a road is not a destruction of its identity; but it must depend upon the situation of the country,

PRISON BOUNDS.

See Insolvent Debtor.

1. A bond for the prison bounds is equally forfeited, if the prisoner make no schedule within 40 days, as if he had left the bounds.—*Higfall vs. Smyth*, 135

2. The amount due upon the execution is the measure of damages in an action upon the bond, and none other need be proved,

3. A schedule filed in another suit, at a previous time, is not a schedule in compliance with the act,

4. Clerks of Courts and Justices of the quorum, (as commissioners of special bail,) have jurisdiction to carry into execution the "prison bounds act."—*Noyes vs. Haynesworth*, 367

RECEIPT.

1. A receipt, like any other paper, is to be construed according to its most obvious import, and will be considered final and conclusive between the parties where it purports to be so, except where some satisfactory and clear evidence shall

be produced of error or mistake.—*McDowel & Black vs. Lemaitre*, 320

2. And after the death of the debtor, who made the payments, the court will not set aside a receipt in full, only from the circumstance that it appears on the plaintiff's books that the amount of goods charged after the date of a receipt prior to the one in question, to the date of the last, with the omission of one article, corresponded with the same mentioned in the last receipt, leaving a balance unpaid,

REPLEVIN.

1. The Statute of 11 Geo. 2, although not binding upon us as a statute law, has been adopted in practice in this state, and as a usage, has become obligatory on us.—*Pemble vs. Clifford*, 31

2. A *scire facias* on a replevin bond can not be resorted to, unless a writ *pro retorno habendo* be issued and returned *elengata*,

3. Where C. distrained for rent as administrator, and as agent for the heirs, (of whom he himself was one,) and the tenant replevies, and during the action of replevin, C. dies, the court *held*, that the action of replevin did not abate, but that the co-heirs and joint tenants of C. by filing a suggestion, might be permitted to come in and defend the suit.—*Talvan-de vs. Cripps*, 164

4. Things fixed to the freehold cannot be distrained, much less a freehold; and of course a writ of replevin will not lie for a freehold illegally distrained.—*Vause vs. Russell*, 329

RIOT.

1. If persons who have assembled for a lawful purpose, do afterwards associate together to commit an unlawful act, such association will be considered an assembling together

I N D E X .

for that purpose: So three or more patrolling may commit a riot.—*State vs. Cole, et al.* 117

2. A negro servant, (slave) with two white persons, may commit a riot.—*State vs. Calder,* 462

3. Where persons, unknown, with the persons indicted were necessary to constitute the offence of a riot, they should be stated to be unknown and so proved: If known, it should have been stated who they were, *Ib*

4. Where it incidentally came out on the examination that the domesticks (slaves) of one of the persons indicted for a riot, were present, and by his order took off some furniture, the court held, the evidence was not such as would constitute them parties to the combination necessary to complete the offence of a riot, *Ib*

SET OFF. *See Discount,*

SHERIFF.

1. The act of 1795, requires sheriffs to give bond to the "treasurers of the state," held, that a bond to the "commissioners of the treasury" is good. *Treasurers vs. Stephens,* 107

2. So where the same act requires that before the sheriff's bond is accepted by the treasurer, it shall be approved of by three commissioners, but the same was only approved of by two. It was held, that as long as the sheriff remained in office, he must be regarded as an officer, and his own failure to perfect his security can not be pleaded in bar against the consequences of his misconduct in office, *Ib*

3. So of the certificate required by the above act from the treasury, and to be recorded in the clerk's office of the district, the sheriff can not object that it has never been obtained, *Ib*

4. So it is not objectionable on the part of the sheriff, that his

bond was for \$ 10,000, and the act required it to be for \$ 5000, *Ib*

5. A return to an execution by a deputy sheriff is a sufficient & legal return.—*Ford vs. Villers,* 144

6. To make out the proof of a return of *non est inventus*, in an action against the bail, it was held that the memorandum "N. E. I. per Jackson," and the following return: "I have, by my deputy, John T. Smart, made diligent search for the defendant, but could not find him, John R. Cleury, sheriff," which purported to have been sworn to before one of the clerks of the sheriff's office, and signed in the hand-writing of such clerk, composed a sufficient return, the sheriff and Jackson both being dead, and no explanation to be obtained. *Mathewson vs. Moore,* 315

7. The sheriff is liable for a trespass in his deputy's taking and selling under an execution the property of the wrong person.—*Jentry vs. Hunt,* 410

8. A sheriff cannot, even by his deputy, serve a writ in his own case.—*May vs. Walter,* 470

SHERIFF'S SALES.

1. There is no implied warranty at sheriff's sales.—*Herbement vs. Sharp,* 264

2. In no case can a sale of lands be regarded as complete until the purchaser has paid his money and the seller conveyed the land, *Ib*

3. A purchaser at sheriff's sale, who has not received titles, may show that the title is not in the defendant, and that he represented to the sheriff that the land was his, and induced him to sell it as such, *Ib*

4. There is no implied warranty at sheriff's sales. The rule of *Caveat Emptor* applies.—*Yates vs. Bond,* 382

SLANDER.

1. To call a person "a thief," "a bloody thief," is actionable; and though the words seem to

INDEX.

have been spoken in a passion, yet the court would not disturb the verdict.—*Holman vs. Fisher*, 189

2. Words charging a person with perjury or subornation of perjury are not actionable, unless it appear by a colloquium, or by the words themselves, that they had reference to an oath taken in the course of a judicial proceeding.—*Power v. Miller*, 220

3. The defendant said of the plaintiff, that he kept a whore house. Verdict \$5000. New trial granted; as the words were uttered but once; and induced by the plaintiff's encouraging the defendant's son to visit his house, having daughters none of the best characters, with whom his son had been too intimate.—*Vetters vs. Harrison*, 230

4. If it be not necessary to set out the words in a libel *literatim*, yet at least it must be set out in intelligible language, shewing the sense and meaning of the words. And where the words laid were, "worse than the lowest vagabonds, &c." and the words proved were "worse than the lowest vagabonds," the court granted a new trial.—*State vs. Walsh*, 243

5. It seems a person may justify the speaking of actionable words, if he named at the time of speaking them, of whom he heard them, and if in truth he did hear them; but this rule is not intended to protect a defendant in the gratification of his malice, by taking shelter under a falsehood published by another; but it is a justification, only so far as it is evidence of the want of malice.—*Miller vs. Kerr*, 285

6. It is no justification to say one has stolen an article, and that he could prove that B. said so, 16

7. The same words, whether spoken before or after action brought, are admissible in evidence, 16

8. In a declaration for slander, it is sufficient to set out the substance of the slanderous words spoken: So it is enough to say, that the defendant had said that the plaintiff stole his potatoes.—*Kyzer vs. Grubbs*, 305

9. It must be stated that the defendant *spoke or published* the slanderous words, 16

SPECIAL COURTS.

1. The act of assembly, providing for special courts "to try all cases that may be ready for trial, whether criminal or civil," does not mean to limit the powers of such courts to the trial of such cases only as may have been previously ready for trial; but such authority to hold a court of sessions, includes all the powers incident to such a court, and necessarily to indict, arraign and try a prisoner; and the act has provided for a grand jury for that purpose.—*State vs. Allen*, 303

STATUTE OF FRAUDS.

See Frauds.

TAXES.

See Constitutional Law.

TRESPASS TO TRY TITLE.

See Evidence, 7, 8.

1. Under the act of 1791, granting to the judges of the Court of Common Pleas, the power of determining all questions arising under caveats, the judge for his own satisfaction, may order an issue of facts to be tried by the jury.—*Trapier vs. Wilson*, 191

2. The court is not bound to suspend the trial of such an issue, until it is taken to the Constitutional court to determine whether it be proper so to direct an issue or not, 16

3. A grant located upon a small island, having the general course of the island, and calling for some marks which could not be found, and for others on the margin of the island, and having a plat with the

INDEX.

- surveyors certificate appertaining, marked "The North Island," and in different places called "the Island," "the place" was *held* to include the whole island, *16*
4. To make out a color of title, to shew the extent of a party's possession, it is not sufficient to show a receipt from the surveyor-general to the party for the fees of the grant, which was taken out in the name of another person, as the receipt might have been to him as agent for the grantee.—*Cuney vs. Platt*, 260
5. To enable a party to succeed in his statutory claim to land, he must prove that he has had possession of the land the full time required by the Statute; he must show the extent of his possession, and that it was adverse, *16*
6. A son may hold land adverse to his parent; however, in all cases the character of the possession is a question for the jury.—*Roberts vs. Roberts*, 268
7. To substitute an office copy of a grant, in a case of trespass to try titles under the act of 1803, it is not necessary that the affidavit of the loss of the original deed should be made just before going to trial. But where the affidavit is sworn to subsequent to docketing the case, for the purpose of being used in that case, and no circumstance independent of the lapse of time, appears to invalidate it, it should be received. The affidavit must be regarded as efficient from the time it is offered.—*Turnipseed vs. Freeman*, 269
8. Where adverse possession for 5 years is proved, a written muniment is of no other use than to show the extent of possession.—*Cabiness vs. Mahon*, 273
9. The possession of a slave, on lands, is not the possession of his owner, unless such possession was authorized by the owner; for to gain a right by

- possession, it must be such a possession as will enable the adverse claimant to sue.—*Harrington vs. Wilkins*, 280
10. The character of possession to land, whether adverse or not, is a conclusion to be drawn from all the circumstances, and belongs to the jury to decide. An adverse character may, and most frequently is implied from possession alone. So, when the person under whom the plaintiff claimed, had said, "I am ignorant whether they (the defendants) have a right or not; I will not wrong them out of a farthing, and if their title appears, I will pay them for the land;" it was *held* that the possession was not such an adverse possession as would give title, *16*
11. To make out a title under sheriff's sale, extrinsic evidence is admissible to show that an execution was lodged, and that the land was sold under it, and the deed made on different days from those stated in the entry, and return endorsed.—*Barnor vs. Joy*, 371
12. An objection to the regularity of a resurvey, (in an action to try titles,) according to the rules of court, must be made before the cause has gone to the jury, *16*

TRESPASS.

1. An action of *trespass* for false imprisonment under a *ca. sa.* can not be supported as long as the execution on its face remains unsatisfied, or even where there is but cost due.—*Wilkins vs. Hall*, 205
2. Trespass *vi et armis*, is a proper remedy by a parent for the taking away his child.—*Vaughan vs. Rhodes*, 237

USES AND TRUSTS.

1. Col. *Laurens*, by his will, devised to Dr. *Ramsay* and wife, all his lands at Long Cane, &c. "To hold the same to them and their heirs in trust to, and

INDEX.

for the use and behoof of his grand daughter *Frances E. Laurens*, during her life, and in case she should have a child or children, or grand child, or grand children living at her death, then he devised the same to such child, &c. to their heirs forever;" the court held that the legal estate vested by the Statute of Uses in the *cestui que use*—*Ramsay v. Marsh*, 252

USURY.

1. Where a note made *bona fide* for a valuable consideration is brought into market, it may like any other property, be sold for less than its nominal value.—*Fleming vs. Mulligan*, 173
2. A note endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against the maker and indorser in the hands of an innocent indorsee; and the fact of the note being a renewal for a part of the original contract, it being between two of the parties to the original contract, does not vary the case. But where a third person, innocent of the usury, takes a new note, it is valid, *Id*
3. It seems, even if a part of a security be for a valid debt, and part for an usurious transaction, the whole will be infected, and this where separate notes are given, *Id*
4. Where in consequence of an usurious agreement, a person is procured to indorse the note given in the usurious transaction, although such indorser at the time knew nothing of the usurious contract, yet his indorsement is void, as usurious. *Wilks vs. Brummer*, 178
5. Where a person borrowed money and gave his note for the amount, with lawful interest, and at the same time made a verbal promise to pay 5 per cent. more interest, making 12 per cent. the court held, upon an action being brought on the

note, that it was usurious and void; although it was left to the borrower's honor only, whether he would pay more than legal interest.—*Willard vs. Reeder*, 302

VENDUE MASTER.

1. When a person employs a vendue master to sell property at a particular per centage commission, the vendue master is not entitled to a per centage upon a bid not complied with. The object of the vendor is not accomplished, nor the duties of the vendue master performed, until the conditions of the sale are complied with.—*Cochran vs. Johnson*, 21
2. Upon an action for money had and received against the defendant, it was averred that he received it as vendue-master, which allegation was not replied to, and verdict was had for the plaintiff, held, that the defendant was not thereby prevented at any time afterwards from taking the benefit of the insolvent debtor's act; for as the question whether he received it as vendue master or not, was not put in issue, he might waive the question at that time, and he has the right to make it whenever it becomes important to him.—*Merritt vs. Westendorf*, 326

VENUE.

1. In a capital case, the court held it was not sufficient cause to change the venue, that the prisoner swore he believed he could not obtain an impartial trial, because a sum of money had been raised by subscription by some of the citizens of the district to apprehend him, he having escaped from the sheriff.—*State vs. Williams*, 383

VERDICT.

See Practice.

WAR.

See Contract.

INDEX.

WHARFAGE.

1. A vessel floating in the dock of any wharf, though moored to a different wharf, must be considered as laying at the former wharf; and the rates of wharfage due by her must go to that wharf.—*Dewes vs. Adger & Black*, 105

WARRANTY.

See Evidence. Sheriff Sales. Damages. Pleading.

1. Where there has been an express warranty, the action must be upon such warranty, and not upon any implied warranty.—*Read vs. Duncan*, 167
2. Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes as the principal, and may bring an action on a breach of warranty.—*Davenport & Co. vs. Riley & O'Hear*, 198
3. A. sold B. a negro slave, and being sued for the purchase money, set up a breach of implied warranty (by a bearer of the note to whom it had been transferred) of the soundness of the slave, and proved that she had the venereal disease; the court held that it was inadmissible to prove, in order to enhance the damages, that she had communicated the disease to many other slaves, by which he received great consequential injury, it not having been proved that the vendor knew of the unsoundness at the time of sale.—*Lightner vs. Martin*, 214
4. When property is sold at a reduced price on account of a known defect, but paid for as sound in other respects, the purchaser may still claim a deduction under an implied warranty for any other defects.—*Ashley vs. Reeves*, 432
5. Whether the number of acres or the metes and bounds constitute an essential part of the contract, (in a conveyance

of land,) or are intended as mere description, must depend upon all the circumstances.—

Talbot vs. Milson, 448

6. And when a certain number of acres are sold, with a description only to fix its locality, and its extent not exhibited by any visible and known marks, and only to be ascertained and marked out by a survey, then it will be considered as a sale of so many acres, and not more or less, 16

WAY.

See Prescription.

WILLS.

See Uses.

W. made a residuary clause to his will in the following words: "The rest and residue of my estate, both real and personal, to be equally divided between my two grandsons *Wilson* and *Thomas*, and delivered to them at the age of 21 years; but should they die, leaving no lawful issue, in that case I give and bequeath the whole of my estate, both real and personal, to *Richard Thomas* and *Mary Goffrey*, *Hebecca Potts* and *Thomas Bell*, to be equally divided between them," held, that *Thomas* (having arrived at 21 years, with issue,) took an absolute estate under the will, and *Wilson* having died under age, and without leaving issue, *Thomas* became entitled to the whole estate; and upon the death of *Thomas*, leaving issue, his children took by limitation and not by purchase.—*Carr vs. Jeannerett*, 66

2. That the intention of the testator ought to govern where it can be discovered is a good rule; but wherever the will is plain, unequivocal, and in technical law language, it is unnecessary to resort to that rule of construction, 16
3. See the opinion of the Court of Equity in this case, which is different from that at law, 75

INDEX.

4. The will of a *feme covert* bequeathing her *choses in action* to her husband, is void, though made with his assent.—*Norvell's case*, 453
5. A paper was offered as the will of A. the preamble being in the hand-writing of a friend, and the disposing clauses in the writing of the testator, but not signed, but ending with a verse directed to be engraved on his tomb, the court *held*, that parol evidence of his declarations were admissible to show whether he intended it for his last will or not.—*Witherspoon vs. Witherspoon*, 50.

WITNESS.

1. Where the agent of the captors libelled the prize in their own names for the captors, and the prize goods were sold by the order of the Court of Admiralty, the court *held* the agents might bring an action in their own names for the purchase money.—*Depau vs. Hyams*, 14.
2. Also *held*, that the marshal, who made the sales was a competent witness to prove the same, *Ib*

3. No witness residing in the state can be examined *de bene esse*, by the common law, and we have no statute authorizing such an examination of a witness residing within *forty miles*, merely because he is a president of a bank.—*English vs. English*, 232
4. Where a witness had been subpoenaed by the *defendant*, and the case was decided in his favor, and execution issued out and satisfied, the witness having neglected to have his attendance taxed, sued the *plaintiff* before a justice of the peace, *held* that the witness could not recover, there being no privity of contract.—*Clements vs. Bagley*, 244
5. A father is a competent witness to prove a gift by himself to his child.—*Smith vs. Littlejohn*, 362
6. A. sold a negro to B. and took his note with C. as security for a part of the purchase money. Judgment was obtained on the note, but it was not satisfied; the court *held* that in an action by B. against A. for a fraud in the sale of the negro, C. was an incompetent witness.—*McCall vs. Smith*, 375

FINIS.

HARVARD LAW LIBRARY